United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

JOINT APPENDIX

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17,715

BOBBY L. FALLS,

Appellant,

v.

UNITED STATES OF AMERICA,

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

INDEX

JOINT APPENDIX

[Filed March 12, 1962]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Holding a Criminal Term

Grand Jury Impanelled on December 21, 1961, Sworn in on January 2, 1962.

THE UNITED STATES OF AMERICA	) Criminal No. 224-62
	)
v.	) Grand Jury No. 225-62
	)
BOBBIE L. FALLS	) Violation: 22 D.C.C. 2403
	) (Second Degree Murder)

INDICTMENT

The Grand Jury charges:

On or about February 21, 1962, within the District of Columbia, Bobbie L. Falls, with malice aforethought, mudered Veronica Smith by means of striking her with his hands, knocking her against a fence and thereby causing injuries to the said Veronica Smith from which she did die, on or about February 21, 1962.

/s/ David C. Acheson
Attorney of the United States in
and for the District of Columbia

A TRUE BILL:
s/Edward R. Gray
Foreman.

[Filed March 16, 1962]

PLEA OF DEFENDANT

On this 16th day of March, 1962, the defendant Bobbie L. Falls, appearing in proper person and by his attorney William A. Tinney, Jr., being arraigned in open Court upon the indictment, the substance of the charge being stated to him, pleads not guilty thereto.

By direction of

MATTHEW F. McGUIRE
Presiding Judge
Criminal Court # Assignment

Present:

United States Attorney

Tim Murphy
Asst. U. S. Attorney

* * *

* * *

[Filed March 25, 1963]

GOVERNMENT'S EXHIBIT NO. 2

Statement of Appellant, Bobby L. Falls.

Office Of The Homicide Squad
Metropolitan Police Department
Washington, D. C.
Wednesday, February 21, 1962
Statement Started At 8:15 am

Homicide Case: Re death of Veronica Smith, negro, age 18 years, pronounced dead at 4:30 a.m., February 21, 1962 by Dr. Leroy Garner at D.C. General Hospital.

By Presinct Detective John C. Wilson:

Q. What is your full name, age and place of residence?

A. Bobbie Lewis Falls, 24, 1505 Vermont Avenue, N.W.

"Bobbie Lewis Falls, you are being held on account of the death of Veronica Smith, who was pronounced dead at 4:30 a.m., February 21, 1961, this death being caused by her being struck, while in the 1300 block of T Street, N.W. about 2:00 a.m., February 21, 1962. I now ask you if you want to make a complete statement telling what knowledge you have of this altercation, so that it can be taken down in typewritten form. Before making such a statement, I advise you that your statement must be made freely and voluntarily; also that your statement will be used in court at your trial, if it becomes necessary. After hearing what I have just told you, do you want to make a complete statement?"

Answer by Bobbie Lewis Falls: "Yes, sir."

By Precinct Detective John C. Wilson:

Q. How long had you known Veronica Smith?

A. About two months.

Q. While alongside of 1901 - 14th Street, N.W., about 2:00 a.m., February 21, 1962, did you have some trouble with Veronica Smith which led to her death?

A. I had some trouble with her.

"Now, Bobbie Lewis Falls, tell me in your own words what occurred that resulted in this altercation."

It was about 11:15 p.m. last night (Tuesday, February 20th, 1962) that I left Veronica Smith in the Spar Restaurant (1900 - 14th Street, N.W.). I went to 7th & T Streets, N.W. to the Ideal Sea Food Grill where I had a cup of hot tea. Then I went to the Mile Long Sandwich Shop at 7th and Florida Avenue, N.W. and had a piece of pie. I was supposed to meet Veronica at 7th and T Streets, N.W., but she didn't show up. I met a boy that they call Gangster, I don't know his name. He and I walked back to 14th and T Streets N.W. We walked straight out T Street.

When we got to 14th and T Streets I seen Veronica standing there talking to some boys that were in a car. When Veronica seen me, she acted like she was shocked. She backed away from me and I smacked her in the mouth.

She ran down the street towards 13th Street and back up on the sidewalk. I walked back up on the sidewalk. I told her to come to me and she said that I could come and get her if I wanted her. She started laughing and running away from me and I chased her.

I was running pretty fast and when I got behind her I pushed her and she fell up by the fence and her coat caught on the fence. She called me, Bobbie, and I told her to get up. She just stayed there and I went over and picked her up. I walked over to a car that was parked by the alley. She leaned against the car and she called me again. I then turned around and walked back to 14th Street, N.W. I went into the Jazzarama and when I came out of there I saw Veronica and Shirley walking up the street. Veronica had her arms around Shirley's (Elizabeth Garnett) neck and they were walking up (north) on 14th Street, N.W.

I walked out of the Jazzarama and when she looked up at me she fell. Me and a boy named Archie (Archie Nelson) went over and picked her up. We took her into the Jazzarama and put her in a booth. I asked Archie if he had some smelling salts and he said that he didn't have any with him. Then we got some napkins and dipped them in water and put

them on her head. She sat beside me with her head on my shoulder and we started to get her up to take her home when she fell out of the booth to the floor. We picked her up and Shirley said that she was faking. We took her on outside and Archie and I held her up and tried to stop a cab, but none would stop. Then Jessie, a Special Police Officer came up. He works in the Spar and he put her in his car and he took her home. I started walking home and Archie went with Veronica. Shirley went up (north) 14th Street, N.W.

I went home and I went to the bathroom and while I was in there the Police came to the house and I heard them talking about my being wanted. I stayed in the bathroom for awhile and when I came out I found out that I was wanted for Investigation of Homicide and I went to the Policeman that was downstairs and I told them that I was the man that was wanted. We then went to No. 13 Precinct. Then we went to the Homicide Squad.

Questions by Detective John C. Wilson:

Q. Were you drunk or sober at the time of this altercation? A. I was sober.

Q. Was Veronica Smith drunk or sober at the time of this altercation? A. She wasn't drunk, but she had been drinking.

Q. Who was present when you pushed Veronica down while alongside of 1901 14th St. N.W.? A. Just me, Veronica and Shirley.

Q. Why did you hit Veronica in the mouth? A. Because she told me a lie and I could have been home asleep. She was supposed to meet me at 7th and T Sts. N.W. and didn't show up and I found her at 14th and T Sts., N.W.

Q. Have you ever had any previous trouble with Veronica Smith? A. No sir.

Q. What is your relationship with Veronica Smith? A. She is my girl friend.

Q. How far did you go in School? A. Eleventh Grade.

Q. Can you read and write? A. Yes.

Q. Have you made your statement and answered my questions freely and voluntarily without any force or promises being used or made by anyone to obtain the same? A. I told you because I wanted to and I wasn't promised anything.

Q. Is there anything you want to add to your statement that has not already been covered? A. No.

Statement finished at 8:50 a.m., February 21, 1962.
Statement typed by Detective Samuel E. Wallace.

/s/ Bobby Lewis Falls

WITNESSED:

/s/ Samuel E. Wallace

[Filed March 18, 1963] 6

EXCERPTS FROM TRANSCRIPT OF PROCEEDINGS

Washington, D. C.

May 22, 1962

The above-entitled matter came on for hearing before the HONORABLE LEONARD P. WALSH, United States District Judge, at 10:00 o'clock a.m.

APPEARANCES:

On behalf of the Government:

LUKE MOORE, ESQ.

On behalf of the Defendant:

WILLIAM A. TINNEY, JR., ESQ.

* * * *

PROCEEDINGS

THE DEPUTY CLERK: The case of The United States of America vs. Bobbie L. Falls.

* * * *

LINWOOD RAYFORD

having been called as a witness by the Government and, having been duly sworn, took the stand, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. MOORE:

Q. Doctor, state your name and address to His Honor and the ladies and gentlemen of the jury, please. A. Linwood L. Rayford, Jr., surgeon, Deputy Coroner for the District of Columbia. ***

Q. Did you, Dr. Rayford, on February the 21st, have occasion to see one Veronica Smith? A. I did.

* * * *

Q. Now, after the identification, did you have an occasion to perform an autopsy on Veronica Smith, Doctor? A. I did.

Q. And during that autopsy, or after performing the autopsy, were you able to determine the cause of death of one Veronica Smith?

A. I was.

Q. Will you tell us whot it was, Doctor? A. The cause of death

was from hemorrhage and shock due to a rupture of the liver with a massive hemmorrhage in the parietal cavity.

Q. Doctor, first of all, let me ask you this: When you performed the autopsy on Veronica Smith, did you notice any external bruises about her body? A. Yes, she had abrasions about both knees, and she had a contusion, which is more literally mentioned as a bruise, over the right side of her lower chest, at the juncture of the fifth and sixth ribs of the sternum.

Q. That bruise was on her right side? A. Yes.

* * * *

13 Q. Now, Doctor, I believe you said there was a hemmorrhage. Was that blood from the liver, Doctor? A. Yes, from the liver and the cessels in the liver.

MR. MOORE: Your honor, may this photograph be marked as Government's Exhibit 1 for identification.

THE COURT: It will be so identified.

THE DEPUTY CLERK: This is Government's Exhibit one marked for identification.

(Document was marked Government's Exhibit No. 1 for identification.)

MR. MOORE: Your honor please, at this time Mr. Tinney has seen this photograph and he knows that it depicts a picket fence that is located alongside the fence of the Spar Restaurant. He says he has no objection to it.

THE COURT: No objection?

MR. TINNEY: I have no objection, Your Honor please.

MR. MOORE: I want to offer it into evidence at this time, please.

THE COURT: It will be received in evidence without objection.

(Government's Exhibit No. 1 was received in evidence.)

14 BY MR. MOORE:

Q. Dr. Rayford, let me show you Government's Exhibit No. 1 which shows here an iron picket fence. That fence, incidentally, is located in the 1900 block of T Street, but for the purposes of this photograph, it is a picket fence.

Looking at that picket fence, Doctor, and assume these facts: Assume that a person -- I better ask you this first, Doctor -- do your records show, Doctor, the physical height of Veronica Smith? A. They do.

Q. What was her height? A. She was five feet and eight inches.

Q. And, by the way, do your records show her age? A. We have a recorded age of 18 years.

Q. What was her weight, Doctor? A. Weight was 155 pounds.

Q. Assume, Doctor, that the fence, the picket fence as shown in this photograph, approximately two and a half feet high, just assume that -- also assume that a person the height and weight of Veronica Smith, that you have just given to us, was against that picket fence in the manner that I am now demonstrating -- that is to say, my body is across the mid-line, the stomach of my body is across the iron picket fence.

15 Assume, Doctor, she was struck, or a person was struck in the rear while across that fence, a severe blow, in your opinion as a surgeon would that blow, together with the position of the person on that fence, be sufficient to cause the type of injury that you saw in Veronica Smith?

A. I would say yes.

Q. An ordinary fall wouldn't cause that type injury, would it, Doctor?

A. And ordinary fall would not.

* * * *

CROSS-EXAMINATION

BY MR. TINNEY:

* * * *

16 Q. Did you make a determination of the alcoholic content, if any?

A. Yes.

Q. Would you tell us what it was? A. It was negative.

Q. It was what? A. It was negative alcohol.

* * * *

22 ELIZABETH H. GARNETT

having been called as a witness by the Government and, having been duly sworn, took the stand, was examined and testified as follows:

* * * *

DIRECT EXAMINATION

BY MR. MOORE:

* * * * *

Q. Do you know one Veronica Smith? A. Yes.

23 Q. All right. Let me direct your attention to February the 21st, 1962, you, of course, knew her on that date? Did you not? A. Yes.

Q. How long had you known Veronica prior to, that is, before February the 21st, 1962? A. About six months.

Q. On February the 21st, did you see her that day? A. That day I didn't.

Q. Did you see her that night? A. Yes.

Q. Approximately at what time did you see Veronica? A. It was around about 12:30.

Q. Did there come a time when you and Veronica went to the Spar Grille or Restaurant, whichever you prefer, which is located at 14th and T Streets, Northwest? A. Yes.

Q. Approximately at what time were you there, that is, would you say what time you first arrived? Did you arrive with her or was she there when you came, or not? A. She was there when I arrived.

Q. What time did you arrive? A. About 12:30.

Q. And you saw Veronica there? A. Yes.

24 Q. That is 12:30 at night? A. Yes.

Q. What, if anything, did you see Veronica doing in the Spar Grille during the time the two of you were there, by way of activities? I am talking about, now, what she did. A. Me and her danced together the whole time we were in there.

Q. Were you in a dancing contest? A. It was a dancing contest and I think she had been in it.

Q. She was able do dance, is that right? A. Yes.

Q. And did dance? A. Yes.

Q. And you did dance, too? A. Yes.

Q. How long did you stay at the Spar Restaurant? A. Until the place closed.

Q. And what time was that? A. Two.

Q. Two o'clock in the morning, is that right? A. Yes.

Q. During the time that you were with Veronica, that is approximately until two o'clock, did you see her drink anything? A. Nothing but Cokes.

25 Q. When I say drink, I mean drink any alcoholic beverages.

A. The only thing she was drinking was Cokes.

Q. Did the two of you leave together? A. Yes, we did.

Q. Tell us what happened, if you will, at the Spar at two o'clock in the morning. A. Well, we waited around for the boys that played in the band and we were playing around with them.

Q. You and Veronica waited around for those fellows? A. Yes.

Q. Proceed. A. We were playing around with the boys in the band -- you know -- taking their instruments out to the car, and we walked out to the car with them and stood there and talked to them.

MR. MOORE: You let your voice drop. Now, keep your voice up.

Q. You and Veronica stood there and talked with some of the fellows in the band? A. Yes.

Q. Now, tell us what happened. A. We were standing on this corner talking to the boys, three of them there, Veronica and myself, and they had put the instruments in the car and we were helping them put them in there, and that is when Bobbie walked up.

26 Q. Who walked up? A. Bobbie.

Q. Bobbie? A. Yes.

Q. Do you see Bobbie in this courtroom? A. Yes, I do.

MR. MOORE: Your Honor please, may the record indicate the witness has identified the defendant?

THE COURT: Mr. Tinney, do you agree?

MR. TINNEY: Oh, yes.

THE COURT: The record will so reflect that the witness has identified the defendant in this case.

BY MR. MOORE:

Q. Did you know Bobbie, as you call him, the defendant, before February the 21st, 1962? A. Yes.

27 Q. How long had you known him? A. About two months.

Q. Now, you say Bobbie walked up -- and, by the way, let me ask you, were you and Veronica and the three fellows standing when Bobbie walked up at that intersection? A. On the corner of 14th and T. On the corner of T.

Q. That is the northwest, is it not? A. Yes.

Q. In the District of Columbia? A. Yes, sir.

Q. And, now will you proceed with what happened when Bobbie walked up. A. Well, when he walked up, he heard one of the boys say something to Veronica, ask Veronica, and he said something to her--

MR. MOORE: All right. Now, take your time and tell us what happened.

Q. Now, do you want to proceed to tell us what happened? A. We were standing there and talking with the boys and Bobbie walked up and he heard one of the boys say something to her.

28 Q. One of the boys said something to Veronica, is that right? A. Yes, sir.

Q. And what happened after that? A. That is when he walked up to her and hit her.

Q. That is when who did that? A. Bobbie.

Q. And which part of her body, did Bobbie strike at that time? A. The face.

29 Q. You say Bobbie struck Veronica. Tell us how. Did he strike her with his hand or with his fist? A. With his fist.

Q. Now proceed from that point and tell what happened after that. A. After he hit her he told her to come there and she said if he want me come and get me, and that is when he chased her.

30 Q. Did you say he chased her? He chased her where? First of all, which way did Veronica go? A. Down T Street.

Q. From 14th, is that right? A. Yes.

Q. Going in the direction of 13th Street? A. Yes.

Q. Was she on the north or south side of T Street? A. She was in the middle of the street, you know, running.

Q. Now, after she was in the street was she at any time on the

sidewalk while Bobbie was chasing her? A. No, she was running in the street.

Q. Now how far did he chase her? A. Down to the gate of the fence, almost next to the alley. Not exactly at the alley but the gate there.

Q. To the gate of the fence, you said, is that right? A. Yes.

Q. Now, are you talking about a fence that runs along by the Spar Grille? A. Yes.

Q. What kind of a fence is that, wooden or iron? A. It is an iron picket fence.

Q. Did there come a time when Bobbie caught Veronica? A. Yes.

31 Q. Tell us, were they on the sidewalk or in the street? A. On the sidewalk.

Q. How far were they from this fence, the picket fence, the iron fence that you were talking about after she was caught? A. He caught her at the fence.

Q. Tell us what happened when Bobbie caught Veronica. A. He hit her.

Q. And tell us what was Veronica's position with respect to the fence? The iron fence, when Bobbie caught her and hit her? A. She was leaning over the fence.

Q. Could you see, or can you tell us, which part of Veronica's body did Bobbie strike while Veronica was on the fence? A. No, I couldn't.

Q. Do you know how many times he struck her? A. No, I don't.

Q. Give us your best estimate as to how far did Bobbie chase Veronica before he caught up with her. A. How far?

Q. Yes. A. From where I was standing I would say about a hundred feet.

32 Q. You were standing at 14th and T, weren't you? A. Yes.

Q. After he struck Veronica and she was lying across the fence, then what happened, or what did you see them do? A. Then Bobbie walked up, just walked away from her toward coming up T Street.

Q. Where was Veronica at that time? A. She was still down by the fence.

Q. Tell us what next happened. A. That is when I went down to the fence.

Q. And what did you do when you went to the fence where Veronica was? A. I helped her.

MR. MOORE: Now, please try to keep your voice up.

A. I caught on to her around the waist and we started up the street.

Q. What was her condition when you say you helped her? Was she standing or lying over the fence, of was she on the ground?

Just tell us what her position was when you came there to help her.

A. She was over the fence.

Q. Sort of demonstrate to us, if you can, just stay there on the witness stand and stand and demonstrate for us, if you will, how Veronica was over the fence. A. Like this (demonstrating).

33 Q. Yes? A. She was over like this (demonstrating).

Q. Was any part of her body resting against the fence? A. The side.

Q. Now tell us what did you do when you got there? A. Well, I caught ahold of her and we started up the street and she was weak, and she told me she couldn't walk, and so I helped her up the street, and that is when we got--not exactly to the corner --she told me she was hurt.

Q. How did you assist her to help her walk? A. I had my arm around her waist and my hand around her waist and she was leaning on me.

Q. Where did the two of you go while you were assisting her? A. Well, we went into a Chinese joint, about two doors from the Spar, and just as we got in the door she fell out.

Q. Then what happened? A. Well, there was a lot, a whole lot of people in there, and this boy Archie, he helped to put her on a bench.

Q. Did you see the defendant at that time? A. Yes, he was in there -- not at the time that I took her in there -- but I saw him later.

Q. What, if anything, did you see the defendant do? A. He came in and sat down beside her and kept slapping her on the face, telling her to wake up.

Q. How many times did he slap her? A. I couldn't recall how many

times he slapped her.

Q. Now, did she wake up when he slapped her? A. No, her eyes were rolled back in her head and he kept slapping her.

Q. Did she say anything while Bobbie was slapping her? A. I don't remember her saying anything.

Q. What, if anything, did Bobbie do at that time after slapping her? A. I don't quite remember.

Q. Did he say anything to her; Bobbie? A. I don't remember.

Q. All right. Now, what was the next thing that happened after Bobbie slapped her? A. I think he left. And this boy -- Archie went and took her outside and was going to get a cab, he took her out and she kept falling, and he kept picking her up and she kept falling, and that is when this fellow named Jessie, that works in this bar, a special police drove up and I stopped him and ask him if he would take her home for me and he said yes, and Archie and another fellow put her in the car.

35 Q. Did you get in the car with them? A. I got in the car but I got out.

Q. Veronica was then taken away; is that right? A. Yes.

MR. MOORE: Will Your Honor indulge me for a moment, please?

THE COURT: Certainly.

Q. Let us go back to the fence where Veronica was when struck by Bobbie. Did you hear her say anything to Bobbie after he struck her? A. I heard her call him.

Q. What did she say to him when she called him? A. She was saying, oh, Bobbie.

Q. Was she asking him to do anything? A. She kept saying, oh, Bobbie, help me.

Q. Whad did Bobbie do? A. He just walked away.

Q. He just walked away? A. Yes.

Q. I believe you said that you knew Bobbie Falls about two months prior to or before February the 21st, is that right? A. Yes.

36 Q. Do you know what the relationship was between Bobbie Falls and Veronica Smith? A. All I know is that they were supposed to have

been going together.

38 CROSS-EXAMINATION

BY MR. TINNEY:

Q. You and Veronica were very good friends, were you not?

A. Yes.

Q. How long had you known her? A. About six months.

Q. And you had known Bobbie Falls how long? A. About two.

Q. You and Veronica lived together at one time, did you not?

42 PHELES T. PEARSON

having been called as a witness by the Government and, having been duly sworn, took the stand, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. MOORE:

44 Q. Now, what time did you leave the club? A. Approximately anywhere from 20 of 2, until about 2 o'clock.

Q. And upon leaving the club did you see Veronica at that time?

A. Yes.

Q. Now, where did you see her then? A. Outside the club.

Q. Who, if anyone, was with her? A. I don't think anyone was with her when she was out there with some other fellows in the band as we were leaving the club.

Q. Did you see another girl with her? A. Yes.

Q. And the club is located at 14th and T Streets, Northwest, is it not?

A. Yes.

Q. During the time that you saw Veronica outside the club, tell us what, if anything, did you observe happen to her at that time. A. We were loading our car up with instruments after leaving the club and she and another young lady were standing outside near the car, and a fellow came up and struck her in the face.

45 Q. Let me stop you here at this point. Do you see the fellow in the courtroom who came up and struck her in the face? A. No, I couldn't make a positive identification. I just saw a fellow come up and strike her.

Q. You didn't know who the fellow was, is that right? A. No.

Q. By the way, did he use his hand or fist? A. I don't know whether

it was a fist or open hand.

Q. Now, after he struck her, then what happened? A. She crossed and ran from him across the street and there were some words and she came across the street again and they were still arguing, and there were some words, and she turned and ran and the person gave chase.

Q. All right. How far did he chase her from where you were standing? A. I would estimate about 50 or 75 yards.

Q. Seventy-five yards? A. Yes, sir.

Q. All right. And what street was she on at this time she was being chased? T Street.

46 Q. Was she being chased in the direction of 13th or in the direction of 15th? A. Thirteenth.

Q. In the direction of 13th? A. Yes.

Q. Tell us whether she was on the sidewalk or on the street. A. On the sidewalk.

Q. Now, on that sidewalk where she was being chased, Mr. Pearson, can you tell us whether or not there is a fence on that sidewalk? A. Yes, there is an iron fence there.

Q. An iron fence? A. Yes, sir.

Q. Tell us what was the next thing you saw after you observed Veronica being chased by the person? A. The person caught up with her and with his right hand struck her in the side -- seemingly it was her right side.

Q. And where was Veronica with respect to the fence at the time she was caught by this person? A. At the gate. There was an open gate at one of the exits coming out of the club.

47 MR. MOORE: Now, please keep your voice up.

Q. I better come a little closer to you. Now, where did you say she was? A. At one of the exits; at the club there was an open gate and she was at the gate.

Q. That was at the gate of this iron fence, is that right? A. Yes, sir.

Q. Q. Is that gate iron or wood? A. Iron.

Q. Let me show you Government's Exhibit 1, and look at it and see whether or not you recognize the area there; also do you recognize or

can you tell us what that is you see in that picture? A. This is the area on T Street next to the Spar and the gate that was there open as of that time.

Q. Does that picture reflect the iron fence or depict the iron fence? A. Yes, sir.

Q. Now, after you saw Veronica at the gate, where she was caught by the person, what did you observe at that point? A. She fell into the fence, or the gatepost.

Q. Was that before or after he struck her? A. After he struck her.

48 Q. What was the next thing you observed? A. Well, there was a lull and she began to call his name and ask him not to leave her and then they moved over to a parked car.

Q. Let me ask you this: What name did you hear her call? A. Bobbie.

Q. And what did he do? A. He then put his arms around her shoulders, or something, and they moved over to the parked car.

* * * * *

49 Q. One further question. I believe you said heard a moan? A. Yes.

Q. After Veronica was struck, you did hear her moan? A. It sounded like her.

Q. Can you tell us whether or not, after she was struck she was holding any part of her body? A. I saw her when she was coming back up the street, and she was holding to her left side; it seemed to be more to the left side, but in the mid-line section, anyway.

Q. You are not quite sure? A. It was more in the mid-section.

* * * * *

52 QUINCY MATTISON

having been called as a witness by the Government and, having been duly sworn, took the stand, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. MOORE:

Q. State your name and address to His Honor and these ladies and gentlement of the jury, please. A. My name is Quincy Mattison, and I live at 910 Division Avenue, Northeast.

Q. You are a musician, are you not, sir? A. Yes, sir.

Q. You know Mr. Pearson, who just left the witness stand? A. Yes.

Q. He is also a musician, is he not? A. Yes.

Q. The two of you play together in the band? A. Yes, sir.

53 Q. Now, let me direct your attention to Feburary the 21st, 1962. On that day were you in the Spar Restaurant or Spa Grille? A. Yes, I was.

Q. Were you playing in the band there? A. Yes, sir, I was.

Q. Now, did you know one Veronica Smith? A. Well, I didn't really know her. I knew her when I seen her come into the Spa Restaurant.

Q. Did you see her on February the 21st? A. Yes, I did.

Q. Do you know approximately what time it was when you saw her? A. It was around two o'clock.

Q. Was she inside the Spa Grille or outside when you first saw her? A. When I first saw her she was inside, yes.

Q. What, if anything, was she doing when you saw her inside the Grille? A. She was standing by the door, that was on the way out, she was standing by the door.

Q. I believe you stated there came a time when you saw her outside? A. Yes.

54 Q. By the way, you better tell us where is the Spa located, at 14th and T? A. Fourteenth and T, Northwest.

Q. Now, when you saw her outside, where was she in reference to the Spa Grille? A. She was standing on the corner of 14th and T.

Q. For the purpose of direction, the Spa Grille is located on the northeast corner of 14th and T, is it not? A. Yes, sir.

Q. And she was standing on that corner? A. Yes.

Q. Tell us what, if anything, did you observe her do while she was standing there. A. She was standing there and talking to me, Mr. Pearson, and another musician, with Miss Garnett.

Q. What, if anything, did you observe happen at that time? A. Well, two fellows walked up and one of them hit Veronica in the face.

Q. Do you know the fellow who walked up and struck her in the face? A. No, I didn't.

Q. Tell us which part of the body was struck. A. I would say he struck her in the face.

55 Q. Look around the courtroom and see if you recognize the fellow

who walked up and struck her in the face. A. Yes, I do.

Q. Point him out to us, please. A. He is sitting there at the table.

Q. How is he dressed? A. He has on a white shirt with brown stripes in it.

MR. MOORE: May the record indicate, Your Honor, that this witness has identified the defendant.

THE COURT: Mr. Tinney.

MR. TINNEY: Yes.

THE COURT: You agree the record may so reflect?

MR. TINNEY: Yes.

THE COURT: All right, the record will so reflect.

BY MR. MOORE:

Q. Tell us what happened next. A. Veronica backed away and she went back up on the sidewalk and he called her and she said, if you want me you will have to come and get me, and he chased her down the street.

Q. Which direction did Veronica run? A. She ran down on T Street toward 13th.

Q. Was she on the north side or south side of the street? A. North.

56 Q. On the north side of the street? A. Yes.

Q. Was she on the sidewalk? A. On the sidewalk.

Q. How far would you say she ran from this intersection where she was first standing? A. Oh, I guess about 30 or 35 feet.

Q. Did the person, whom you have identified as the defendant, run after her? A. Yes, he did.

Q. Can you tell us whether or not he caught up with her? A. Well, I wasn't looking right then. I was still putting my instruments in the car and I guess he caught up with her because I heard the footsteps stop.

Q. What was the next thing you observed after seeing both of them run? A. The next thing I observed was Veronica leaning over the fence holding herself.

Q. You say leaning over a fence? A. Yes.

Q. Tell us what kind of a fence. A. It was a metal picket fence.

57 Q. Is that the fence that runs alongside the Spa Grille? A. Yes, it was.

Q. On the T Street side, is that right? A. Yes.

Q. While she was leaning over the fence what, if anything, did you observe at that point? A. Well, she seemed to be hurt.

Q. What was the next thing you saw happen? A. The next thing I saw the man over there walking away from her. She was still in the fence and she was calling to him.

Q. What was she saying? A. She was calling Bobbie.

Q. You didn't hear what else she said, if anything in addition to calling him? A. I don't recall.

Q. What did you observe this defendant do when he was called by Veronica? A. He just walked away.

Q. In which direction did he walk? A. He was walking on T Street toward 14th.

Q. He walked back in the same direction from which they had run, is that right? A. Yes.

58 Q. What was the next thing you saw Veronica do then? A. The next thing I saw was Veronica walking up that way too with Miss Garnett.

Q. How was she walking with Miss Garnett? A. I think Miss Garnett was trying to help her along because she wasn't walking very well. She seemed to be having a little trouble.

Q. Who seemed to be having a little trouble? A. Veronica.

Q. Veronica. How far did Veronica and Elizabeth walk up the street or sidewalk, what was the next thing you observed? A. That is all because I got in the car and left.

Q. You and Mr. Pearson left, is that right? A. Yes.

Q. What, if anything, did the defendant at the time say to Veronica when he first walked up to her and struck her? A. He said something like, I will beat you and your man, or something like that. I don't remember the exact words he said.

* * * * *

59 CROSS EXAMINATION

BY MR. TINNEY:

* * * * *

60 Q. Did you see her fall? A. No, I didn't see her fall.

* * * * *

61 ARCHIE NELSON

having been called as a witness by the Government and, having been duly sworn, took the stand, was examined and testified as follows:

62 DIRECT EXAMINATION

BY MR. MOORE:

* * * * *

Q. Do you know, or did you know one Veronica Smith? A. Yes, I did.

Q. Did you, or do you know the defendant in this case? A. Not as I know Veronica.

Q. You didn't know him as well, is that it? A. Yes.

* * * * *

63 Q. Now, on the day of February the 21st, in the early morning hours, did you see Veronica Smith at that time? A. Yes, I did.

Q. Where was she when you first saw her? A. When I first saw her some fellow was holding her up out in front of the Jazzerama.

* * * * *

65 Q. When she was being held up what, if anything, did you observe about her condition? A. When I came down the street and I seen the people holding her up, I gathered with the crowd, and I heard some fellow say she had been drinking, so I told the fellows to leave her alone.

She looked to me like she hadn't been drinking but like she had been hurt so I took her inside the Jazzerama.

* * * * *

Q. Tell us what happened after you took her inside. A. After I took her inside I sat her down and up comes Bobbie from nowhere.

Q. You are talking about the defendant now? A. Yes. And about two seconds later Shirley comes up. Bobbie sits down beside her.

Q. Sits down besides Shirley or Veronica? A. Beside Veronica.

66 I was holding Veronica's head up and everybody kept talking about that she had been drinking, and she didn't look to me like she had been drinking. Bobbie kept slapping her on the face and I said, Bobbie, stop.

And Bobbie said, Oh, this bitch will leave with me. She did it before.

Bobbie got up and Veronica stood by the table and the chair, and that is when I told Shirley to find someone to take her home.

* * * * *

71 JESSIE HARRISON

having been called as a witness by the Government, and having been duly sworn, took the stand, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. MOORE:

Q. Will you please state your name and address to His Honor and the ladies and gentlemen of the jury? A. Jessie Harrison, 5508 Kansas Avenue, Northwest.

Q. What is your occupation? A. I am a special officer.

72 Q. And where do you work as a special officer? A. I work at one place at 1901 14th Street, Northwest.

Q. Is that the Spa Grille? A. That is right.

* * * * *

Q. Did you -- first of all, let me ask you: Do you know the deceased in this case, Veronica Smith? A. Only by seeing her come into the Spa two or three times. I didn't know her at that time.

Q. Did you see her on February the 21st? A. Yes, I did, sir.

* * * * *

73 Q. After seeing her on that occasion, when she was about to go outside, when did you next see her? A. After I had gone up and gotten my car and came back, on my way home. I saw a crowd of people standing in front of this restaurant, this Chinese place, the address I don't know, so I stopped and parked to see what was happening -- what was going on -- and the deceased girl and the two fellows were holding her.

Q. Holding her up? A. Yes.

Q. And how much time had elapsed between the time you had seen her about to leave the Spa Grille, and you next saw her when some-

74 body was holding her up? A. I came out of the Spa about 2:10. I checked some doors on my way up to where my car was parked on both

sides of the street. When I got to my car I seen her on my way home. She was in front of this restaurant on the street and two men were holding her up.

Q. You didn't know what happened to her in the meantime? A. No, I didn't.

* * * * *

75 Q. What did you observe about Veronica's condition? A. Well, I didn't know what had happened to her, so quick, because when she

76 left the Spa she was all right and I knew she wasn't drinking, because I had never seen her drink anything but sodas, and I couldn't imagine what had happened. That is when I started asking what had happened to her.

Q. Could you ascertain whether she was able to walk or not? A. It didn't seem like she was able too much to walk.

* * * * *

* * * * *

83 JOHN DAVID JACKSON

having been called as a witness by the Government and, having been

84 first duly sworn, took the stand, was examined and testified as follows:

DIRECT EXAMINATION

BY MISS LINDEMANN:

Q. Officer, would you tell us your name and your assignment, please? A. Private John David Jackson, assigned to the 13th Precinct.

* * * * *

86 Q. Did you place the defendant under arrest at that time, Officer? A. We did.

Q. At that time did you have any conversation with the defendant? A. Yes, we did.

Q. Would you tell us what you said to him and what he said to you? A. He asked us if he could change his clothes and we consented.

We advised him that he could change his clothes and we asked him what happened with the girl and he said that he just pushed her and she hit her head against the car in the 1300 block of T Street, Noethwest.

* * * * *

87 CROSS EXAMINATION

BY MR. TINNEY:

* * * * *

88 Q. He did state, as a matter of fact, Officer, that he did in fact strike the decedent? A. He stated he pushed her.

Q. He pushed her. All right, to use your words, he pushed her.

* * * * *

91 JOHN C. WILSON

having been called as a witness by the Government and, having been first duly sworn, took the stand, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. MOORE:

Q. Will you state your name and assignment to His Honor and the ladies and gentlemen of the jury, please? A. John C. Wilson. I am a detective attached to the Homicide Squad of the Metropolitan Police Department.

92 * * * * *

Q. During the course of your investigation, did you have an occasion to see the defendant in this case? A. I did.

* * * * *

93 Q. And he did give you a written statement, did he not? A. Yes, sir.

Q. Do you have that statement with you? A. I do.

Q. May I see it? (Statement handed to counsel.)

MR. MOORE: May this statement, Your Honor, be marked as Government's Exhibit 2 for identification?

THE COURT: It will be so identified.

* * * * *

95 MR. MOORE: Your Honor, may this photograph be marked as Government's 1-A, the first one was 1, and this is 1-A.

THE COURT: It will be so identified.

THE DEPUTY CLERK: Government's Exhibit 1-A marked for identification.

BY MR. MOORE:

Q. Will you look at Government's Exhibit 1-A, Officer and tell us what that is? A. This is a picture of the fence taken from the side nearest the Spa Restaurant showing approximately where Veronica Smith was supposed to have fallen.

Q. This is a close-up of that fence, is it not? A. That is right.

MR. MOORE: Your Honor please, Mr. Tinney has seen this and
96 says he has no objection.

THE COURT: Have you any objection?

MR. TINNEY: No objection, Your Honor please.

THE COURT: It will be received without objection.

(Photograph was marked Government's Exhibit 1-A and received in evidence.)

* * * * *

98 MR. MOORE: Your Honor, may we introduce this statement at this time into evidence?

THE COURT: Is there any objection?

MR. TINNEY: No objection, Your Honor please.

THE COURT: It will be received without any objection.

* * * * *

(Statement of Bobbie Falls was marked Government's Exhibit 2 and received in evidence.)

* * * * *

101-1 [Filed January 21, 1963]

MR. TINNEY: Your Honor please, may we come to the bench?

THE COURT: You may

(AT THE BENCH IN A LOW MONOTONE):

MR. TINNEY: At this time for the record I wish to move for a judgment of acquittal, the Government having rested its case. I do not propose to pursue this matter in any form of argument but I want the record to reflect that I made this motion.

THE COURT: And your grounds, that the prosecution has failed to establish --

MR. TINNEY: That the Government has failed to establish at the present time a prima facie case.

THE COURT: On the basis of casual connection between the death --

MR. TINNEY: -- and any other possibility. I do not like to say possibility but at least that is the grounds for my motion.

THE COURT: The motion will be denied.

MR. TINNEY: I propose to put this witness on the witness stand and I am going to waive the opening statement. I will do that in open court.

THE COURT: All right.

(END OF BENCH CONFERENCE. OPEN COURT):

MR. TINNEY: Your Honor please, at the present time we will now waive the opening statement which we had heretofore reserved.

101-2 THE COURT: Ladies and gentlemen, that is the defendant's right. The defendant may elect not to make an opening statement if he so desires.

You may proceed.

MR. TINNEY: Will you take the witness stand.

Whereupon,

BOBBIE LEWIS WHITE
BOBBIE LEWIS FALLS

having been called as a witness in his own behalf, and having been duly sworn, took the stand, was examined, and testified as follows:

DIRECT EXAMINATION

BY MR. TINNEY:

Q. Now your full name, sir? A. Bobbie Lewis White.

Q. Do you have any other name? A. Bobbie Lewis Falls.

Q. Now how is it that you have two names, Mr. Falls or Mr. White? A. My grandmother raised me and when I got old enough to go in the Service and I had to get a birth certificate, and my birth certificate shows Bobbie Lewis Falls.

Q. Now on the night of the 21st of February, were you known in the community and among your friends by both White and Falls? A. Yes, sir.

Q. Do you use both of those names at the present time? A. No,
101-3 sir.

Q. Which name do you use now? A. Falls.

Q. Now did you know Veronica Smith? A. Yes.

Q. How long had you known her? A. I knew Veronica for about two months.

Q. Now on this particular occasion and directing your attention specifically to February 21, did you happen to be in her company at any time on that day or night? A. Yes, I was.

Q. Now when was the first time did you see her on the 21st of February? A. Veronica and I were together at about 8:00 o'clock that night at Atlee Seafood Grill.

Q. Where is that located? A. At 7th and T Northwest.

Q. And what were you doing there? A. I had chicken wings and with french fries and Veronica had a cup of hot tea and I had a cup of hot tea.

Q. You have seen the written statement which has been offered into evidence with your signature on it, have you not? A. Yes, I have.

Q. And did you read it just a minute ago sitting at counsel table? A. Yes, I did.

101-4 Q. Answer this question yes or no. Does that statement contain as far as you can recall, all of the statements which you made to Officer Wilson when he questioned you on the morning of the 22d of February? A. As far as I can remember doing.

Q. All right, I ask you this: Can you read and write? A. Yes, I can.

Q. How far did you go through school? A. I finished the eleventh grade.

Q. Did you read this statement also on the very morning when you gave it? A. Yes, I did.

Q. Is that statement truthful? A. Yes, it is.

Q. Now did you on the 21st of February strike the deceased, Veronica Smith? A. Yes, I did.

Q. Where did that take place? A. At 14th and T Streets, Northwest.

Q. Now had you been in her company continuously or not before, immediately before this slapping took place? A. No, I had left and I went back to 7th and T and then come back to 14th and T.

Q. Now you say, your words are, you had left. Where had you left from? A. From the pool room in the 1900 block of 14th Street.

101-5 Q. And while you were in the pool room where was Veronica Smith, if you know? A. She was supposed to be in the Spa.

Q. The Spa. That is this restaurant or grille? A. Yes.

Q. Now did you take here there? A. We went there together.

Q. Now specifically, did there come a time when you saw Veronica Smith standing on the corner of 14th and T Streets, engaged in what appeared to be conversation with some people? A. Yes, I did.

Q. What did you do? Tell us about that? A. I seen Veronica about ten or five minutes till 2:00. When I walked up to her she acted like she was shocked when she first seen me. I had a pair of black gloves on when I walked up and I smacked Veronica.

Q. And then what happened? A. She ran down the street and back to the sidewalk.

Q. Where? A. She ran down the street and back to the sidewalk and I walked back to the sidewalk and I called her, and I said, come here Veronica. She laughed. She said, if you want me, come and get me.

She turned around and started running and I started --

MR. TINNEY: Please slow down. The reporter has to take down all you say.

101-6 A. -- chasing after her. We got down by the fence where the gate is and I was running pretty fast and she fell right between the gate. And I stopped and I looked at her coat. She had a long black coat on. The tail of it was up on the gate, but she wasn't on the gate.

I turned around and she called me, and she said, Bobbie. I went over and I picked her up and there was a white car sitting right by the

curb in the alley parked. I picked her up and we walked over to the car and I turned and I walked away. She called me again so I turned and looked back and I walked on up the street. She was leaning on the car, she was leaning forward on the car. I walked down the street around the Jazzarama. I walked in the Jazzarama, I walked around the floor and I come back to the door. And when I come back to the door I seen Shirley and Veronica and Veronica looked up and looked up and seen me and she fell.

I walked over and I picked her up and about this time Archie Nelson walked up and he had to take her in the Jazzarama. I took her in Jazzarama and put her on a seat and I sat down beside her and she put her head on my shoulder, and I looked up and asked Archie, do you have any smelling salts. And he said, no, I don't have any with me.

Q. Who is Archie? A. He is the one sitting back there with the brown coat on and the red shirt.

Q. Is he one of the witnesses who has already testified here today?

101-7 A. Yes, he is.

Q. All right now, go ahead. A. So I got some napkins and I dampened them and I put them to her face. So Archie told me to get a cab. I got up and she fell in between the seats. I walked to the door. Archie went with me and I told Veronica I couldn't get no cab. So I seen Jessie, the special policeman in the Spa. I can't recall who asked him to take her home but anyway I know that I helped put her in the car and that was the last I seen of Veronica.

I walked up the street and Shirley, she walked up the street behind me. Her and another boy. She got in the car with Archie and Jessie -- well she got in the front. They sat there for about two or three minutes and Shirley got out and walked back and that is the last I seen of them until the police came to my house and told me they wanted me for investigation for homicide.

Q. Did you see Veronica Smith taken away by Jessie? A. I walked up the street and the car was still sitting there in front of 1907.

Q. Where did you go after that? A. I walked up 14th Street, across U Street, and I turned around and walked back to 1505 Vermont Avenue.

Q. Is that where you are living at at that time? A. Yes, I did.

Q. Did you stay home? A. When I went in I went upstairs to the bathroom.

101-8 Q. Well, did you stay home? A. Yes, I stayed home.

Q. Did you push Veronica Smith over this fence? A. No, I didn't push her over.

* * * * *

CROSS EXAMINATION

BY MR. MOORE.

* * * * *

Q. How long did you know her? A. About two months.

Q. She was your girl friend? A. Yes.

Q. And did you ever go to her home at 1324 Columbia Road? A. I went there one time until we moved to the Dunbar Hotel.

Q. You say we. You lived there with Veronia at the Dunbar Hotel? A. Yes.

Q. You are married, aren't you? A. Yes, I am.

101-9 Q. Now on February 21st, what time did you first see Veronica? A. I seen her about 8:00 o'clock.

Q. She wasn't with you was she? A. She was in the seafood grille waiting for me to get off from work.

Q. What time did you get to the Spa, if you went there with her? A. About 11:00 or 11:15.

Q. You left her there did you not? A. Yes, I left out. I left her in there.

Q. She did not complain to you about her condition or anything of that nature, did she? A. She didn't say anything.

Q. She was in good shape walking with you, was she not? A. She was walking with me.

Q. No complaints from her about her condition? Now let me ask you -- what time did you return home?

* * * * *

Q. Did Veronica complain to you at any time during that night about her condition or any condition? A. No, she didn't.

Q. And now you say you were in the Spa at approximately 11:00?

101-10 A. Between 11:00 and 11:15.

Q. Did you leave her there at that time? A. Yes, I left out.

Q. Was Shirley or Elizabeth Garnett with Veronica when you left? A. No, she wasn't.

Q. You know Elizabeth Garnett? A. I know her as Shirley.

Q. Did you ever see Elizabeth Garnett and Veronica together on February 21st? A. Not until that night about 2:00.

Q. About 2:00 o'clock? A. Yes.

Q. After you saw Veronica at 11:00 o'clock in this bar, when did you next see her? A. I was walking up the street and she came up the street and asked me where I was going. I seen her then.

Q. Well what time was it when you walked up and struck her? A. I would say it was about 2:00.

Q. It was about 2:00 o'clock? A. Yes.

Q. Where was she then? A. Fourteenth and T.

Q. You were wearing gloves and you struck her with your fist? Is that right? A. I smacked her.

101-11 Q. Did she fall backwards when you hit her? A. No, sir, she didn't.

Q. What did she do when you struck her? A. She was on the street.

Q. You saw her talking with three fellows there on the street, didn't you? A. Yes.

Q. And you were angry about that, weren't you? A. No, I wasn't angry about that.

Q. Well at the time you struck her didn't you say, I will beat you and your men? A. I said I will fight you and your men.

Q. Well when you say she was not that close to the fence, tell us what you mean? A. She wasn't right up against the fence.

Q. Well how far? Was she more than a foot from it? A. Yes, she was more than a foot from it.

Q. More than two? A. About two from it.

Q. Now were you running alongside of her or were you in the rear of her? A. In the rear. I was in the rear of her.

Q. And you caught her, didn't you? A. Yes, I caught her.

Q. And which part of her body did you catch? A. Which part

101-14 did I catch?

Q. Yes? A. I caught her right in the back, right up under the right shoulder, I think it was.

Q. I didn't get that. I missed that. I am sorry. A. Right by her right shoulder, under her right shoulder.

Q. And you reached your hand over her right shoulder? A. I ran into her.

Q. Sir? A. She was right in the gate and that is when I ran into her. She was trying to stop and get out of my way and I was running too fast to stop and she stopped me right there.

Q. And you ran into her? A. Yes.

Q. Did she fall? A. She fell between the gate. Her coat fell on the fence. She fell between the fence.

Q. Isn't it a fact, sir, she was laying across that fence? A. No, because when I picked her up she wasn't leaning across it.

Q. Now when you caught her. You say you caught her by the right shoulder? A. Right. I ran into the right shoulder.

Q. Now will you explain what you mean by running into her and catching her? A. She tried to step out of my way. The gate to the

101-15 fence -- she was running down the street and I was running down the street and I ran right into her. Then she tried to duck so I would run right on down.

Q. Well did you tell the police in your statement that you ran into her? A. Yes, I think so.

Q. Isn't it a fact that you say you told the police, I was running pretty fast and when I got behind her I pushed her, and she fell up by the fence? A. I meant the same as running into her.

Q. You say you mean by pushed that you ran into her? A. Yes, the same.

Q. Now did you strike her after you caught up with her? A. No, I didn't strike her at all.

Q. You didn't strike her at all? A. With my hand?

Q. Yes? A. No, I didn't strike her.

Q. You had already struck her one time, hadn't you? A. Yes.

Q. What was your reason for chasing her? A. I called her and she said, if you want me come and get me and I started running after her.

Q. You were running after her because she said so? Is that right? A. Yes.

101-16 Q. You ran about one hundred feet or so, didn't you, from Fourteenth in the direction of Thirteenth? A. I don't know how many feet it was.

Q. You are familiar with that area, are you not, sir? A. Not too familiar, no.

Q. Now after you caught up with her, you heard the witness say you struck her, did you not? A. Yes.

Q. You deny that? A. Yes.

Q. Did there come a time when she was either on the ground or on the fence as you remember it? A. Yes, there come a time when she was on the ground.

Q. She was on the ground? A. Yes, and her coat tail was on the fence.

Q. And what did you do while she was lying on the ground? A. I turned and I walked away. I turned and she called me, and she said, Bobbie. I turned and told her to get up and then I went back and picked her up.

Q. Did you pick her up? A. Yes, I picked her up.

Q. Did you pick her up by yourself? A. By myself.

Q. You knew she weighed 155 pounds? A. I didn't know exactly how much she weighed but I knew she was pretty heavy.

101-17 Q. When you picked her up what did you do with her? A. We walked over to a white car parked at the curb.

Q. And then what? A. She leaned on the car forward and I turned around and walked away.

Q. Did you leave her there? A. Yes, and she called me again.

Q. Did you hear her moan? A. No, I didn't hear her moan.

Q. Did you hear her say her side was hurt? A. No.

Q. Did you see her have her hand against her side? A. No, I didn't.

Q. Did you ever hear her say, Bobbie, come here and help me? A. No, she didn't say that. She only said, Bobbie.

Q. Well when you say you left her against a car, was she able to walk on her own power? A. I don't know. When I left her she was leaning on the car forward.

Q. You left her? A. Yes.

Q. And what did you do? A. I walked up to 1907 Fourteenth Street.

Q. You first walked back to the corner from which you had run, didn't you? At Fourteenth and T? A. Will you repeat that again?

101-18 Q. Well after you left her leaning on the car, according to you, you then walked back to Fourteenth and T, did you not? A. Yes, I was going back to 1907.

Q. Before you would get to 1907 Fourteenth Street, you would get back to the intersection of Fourteenth and T? A. You had to get to the intersection before you get to 1907.

Q. So you retraced the steps that you had just made? In other words, you went back in the same direction from which you had run? A. Yes.

Q. And did you see Elizabeth Garnett go down and assist Veronica? A. No, I didn't.

Q. You didn't see that ? A. No.

Q. Well what was Veronica doing the last time that you saw her after you had left her at the car? A. The last time I seen Veronica, Archie Nelson got in the car first.

Q. No, before you get to that point. After you left her leaning on the car? A. What was she doing?

Q. Yes. A. She was just leaning on the car.

101-19 Q. And she was still in that position until you got out of sight? That is, until you walked back to Fourteenth and T and then turned north on Fourteenth Street? A. After she leaned on the car -- after I went over and she leaned on the car, I turned around and walked away and I didn't look no more. I walked on around the corner.

Q. You never looked back? And when you passed Fourteenth and T, did you see Elizabeth Garnett there? The girl you call Shirley? A. If she was there I didn't pay any attention.

Q. All right. Did you at any time see Elizabeth Garnett assisting Veronica? A. When I walked down to 1907 Fourteenth Street I seen Elizabeth, Shirley, and Veronica.

Q. And wasn't Elizabeth holding Veronica at that time? A. When I seen her Veronica had her arm around Shirley's neck.

Q. What did you do? A. What did I do?

Q. Yes? A. I walked out and when I walked out the door Veronica looked up and she fell and I walked over and helped pick her up.

Q. You helped pick her up? A. Yes.

Q. Who helped whom? A. Archie Nelson.

101-20 Q. Isn't it a fact, sir, that when you saw Veronica either in one of these little restaurants after you had struck her and chased her, that you came back and slapped her? A. Yes, I tapped her on the face about three times.

Q. You say you tapped her? A. Yes, like this (demonstrating).

Q. Well, what was her condition at the time you did that? A. I don't know what her condition was then. I remember Shirley saying she was faking. So I sit down beside her.

Q. No, I am not sure whether you answered my question. When you tapped her on the face, as you call it, what was her condition then? A. She seemed to be like a drunk person. Like a person that had too much to drink and she was real limber and she was quite heavy.

Q. I didn't hear you. A. She was heavy.

Q. Heavy? A. Yes.

Q. And you were trying to revive her when you were slapping her? A. Yes.

Q. Did she appear to be unconscious to you? A. No, she didn't because she kept breathing. She was breathing kinda loud.

101-21 Q. Isn't it a fact, sir, when you slapped her across her face, you said in the presence of Archie Nelson this b and when I say b, I am referring to a profane word. This b --

* * * * *

Q. This bitch when I left her before she woke up and if I go now she will wake up? A. I don't remember saying that.

Q. You do not deny saying it? A. I don't remember saying that.

Q. My question is, you do not deny that you said it? A. Well, I didn't say it.

Q. Now you know Jessie --

* * * * *

Q. Did you know Mr. Harrison was a special policeman? A. I don't know him personally. I only know him when I see him at the Spa.

Q. Now you didn't assist anyone in putting Veronica in Mr. Harrison's car, did you? A. No, I was trying to get a cab at first.

101-22 Q. And you were not successful? Is that right? A. No. One cab acted like he was going to stop. He didn't. He pulled over and he left.

Q. My question to you -- my first question to you was, you did not assist Mr. Nelson in putting Veronica in Mr. Harrison's car, did you? A. I helped him put her in because he got in first.

Q. I believe you said you knew Mr. Harrison? A. Jessie?

Q. Yes? A. I said I only know him from walking in the Spa. I don't know him personally.

THE COURT: Only by what?

THE WITNESS: By seeing him in the Spa as a special policeman.

* * * * *

[BY MR. MOORE:]

101-23 Q. You heard Mr. Harrison say when he testified that you did not assist Mr Nelson in putting Veronica in the cab? In his car? A. I heard him.

Q. You didn't go with Veronica, did you, when she was taken home? A. No, I didn't.

Q. At the time you saw her in the cab, did you see her when she was placed in the car? A. Yes, I did.

Q. Did you notice what her condition was at that time? A. It still seemed to be the intoxicated condition.

Q. You said intoxicated. Did you smell any whisky on her breath? A. No, I didn't smell any.

Q. Did you see her drinking any whisky while she was in the Spa? A. No, I didn't see her drink while she was in the Spa.

Q. And you heard the coroner say there was no alcohol content in her stomach when he performed the autopsy? You heard that didn't you? A. I heard it.

* * * * *

101-24 Q. You heard the coroner say that? A. Yes, sir.

Q Where did you go when Veronica was taken from Fourteenth Street home? A. I walked to Fourteenth and U and at Fourteenth and U I went to 1505 Vermont Avenue.

Q. Is that where you live? A. Yes.

Q. What time did you arrive home? A. I don't know the time. I didn't have no watch.

Q. It was before 6:00 o'clock, wasn't it? A. Oh, yes.

Q. You were there when the police arrived, weren't you? A. Yes, I was upstairs in the bathroom.

Q. Did you hear the police downstairs? A. Yes, I heard them downstairs.

Q. Did you know the police had been there at least two or three hours before they saw you? A. Yes, I know they had been there.

Q. You knew they were looking for you, didn't you? A. Yes, yes.

* * * * *

Q. Did you at any time go to Veronica's home at 1324 Columbia Road after she was taken home to see what her condition was? A. No,
101-25 I didn't.

Q. I asked you, I believe earlier, and I believe you said you didn't know what time you arrived at 1505 Vermont Avenue? Is that right? At your home? A. Yes.

Q. How long was it after Veronica had been taken away from Fourteenth Street that you arrived home? A. I don't recall. I don't know.

Q. Isn't it a fact that you told Officer Jackson that you had pushed Veronica against a car? A. No.

Q. You deny telling Officer Jackson that? A. I said I walked over and she was leaning on a car.

* * * * *

101-27 ELIZABETH H. GARNETT

having been called previously as a witness by the Government, resumed the stand, after having been reminded she was still under oath, was examined, and testified further as follows:

DIRECT EXAMINATION

BY MR. MOORE:

Q. Elizabeth after you saw this defendant chase Veronica down the sidewalk, did you at any time see this defendant pick Veronica up and take her over to a car? A. No, I didn't.

Q. Were you in a position where you could see down that sidewalk where Veronica had run? A. Yes.

* * * * *

Q. When you came down to assist Veronica was she leaning against a car or was she on the ground? A. She was still on the fence.

* * * * *

101-28 ARCHIE NELSON

having been previously called as a witness by the Government, and having been reminded he was still under oath, resumed the stand, was examined, and testified further as follows:

DIRECT EXAMINATION

BY MR. MOORE:

Q. Now Mr. Nelson during the time that you were trying to revive Veronica and you saw this defendant present, did you hear this defendant say, this bitch when I left her before she woke up and if I go now she will wake up? A. Yes, I did. I heard him.

Q. Bobbie Falls made that statement? A. Yes, sir.

Q. Did you ever see this defendant while you had Veronica in that cafe, dip a towel in some water and apply it to her face? A. No, I didn't.

Q. Did he do that? A. No, he didn't.

Q. Did he assist you to put Veronica into Mr. Harrison's car?

A. No.

101-29 MR. MOORE: That is all I have, Your Honor.

MR. TINNEY: Wait just a minute.

CROSS EXAMINATION

BY MR. TINNEY:

Q. Don't answer this until Mr. Moore has been given a chance to object if he wants to.

If you had seen Bobbie Falls administering to the deceased, would you tell us now? A. Bobbie Falls didn't do nothing but sit there on the side of the car and slap her on the face.

Q. He was sitting beside her, wasn't he? A. Yes.

Q. And he was patting her, wasn't he? Trying to arouse her?

A. I wouldn't call it patting. He was hitting awful hard and I said, stop slapping the girl.

Q. You were sitting there? A. I was, yes, sitting behind her

trying to hold her head up.

Q. Now my question -- the first question I asked you, will you answer that please. If he had, if Bobbie Falls had been trying to assist this young lady, the deceased, would you tell us now? A. If he had?

Q. Yes? A. If he had.

Q. In other words, my question is, would you change your testi-

101-30 mony? Would it be any different? A. No, it is the same as I said.

* * * * *

MR. MOORE: That is the Government's case, Your Honor.

THE COURT: All right. Is there anything further?

* * * * *

(AT THE BENCH:)

MR. TINNEY: Just out of an abundance of caution, if Your Honor please, I want to renew my motion now that the entire case is in, that will be without pursuing the matter in formal argument.

THE COURT: The motion will be denied.

* * * * *

102 Washington, D.C.
May 23, 1962

[Filed November 14, 1962]

The above-entitled cause was resumed for hearing before HON. LEONARD P. WALSH, Judge, and a Jury, at 10 o'clock a.m.

* * * * *

103 CHARGE TO THE JURY

THE COURT (J. Walsh): Ladies and gentlemen of the jury, we of course have now reached that point in the case when it becomes your duty as jurors to consider the guilt or innocence of the defendant, Bobbie L. Falls.

Bobbie L. Falls stands before you charged under the indictment with the offense known to the law as Second Degree Murder. It is the duty of the Court to instruct you on the rules and the principles of law which apply to this particular case, and you are bound and obligated to

follow these rules and principles in your deliberation of the case under consideration.

Now when the Court tells you that it gives you the rules and principles of law that apply in this particular case, it does not imply that you are not the sole and the exclusive judges of all the questions of fact.

On the other hand, ladies and gentlemen of the jury, you are the sole judges of the questions of fact. In other words, it is for you to determine what occurred on February 21, 1962, at 14th and T, or adjacent thereto.

104 It will be for you to determine all of the issues of fact from the evidence only, and from the exhibits which have been introduced.

Now the testimony that you are to determine this case on is the testimony that comes from that witness stand and from no other source.

The counsel for the government, Mr. Moore, and the counsel for the defendant, Mr. Tinney, have the right if they so elect to make opening statements indicating to the jury what they hope or what they will prove to you or show to you for their respective parties, and at the conclusion of the case, as you know, they have the right to sum up, summarize indicating to you what they believe to be the facts that they have shown to you during the course of the trial.

As you know, both counsel are advocates trained in presenting cases. They summarize and they naturally have the right to place the most favorable light on the evidence that they have introduced.

The Court merely states to you that statements of counsel, either in the opening or in the closing, are not to be considered by you as evidence, and these statements, as I have said, are merely their impression and their recollection of the facts which control.

Now as you know, or as I now instruct you, the indictment which

105 has been presented in this case is not to be considered by you as evidence. It is merely a charge preferred by the government against the defendant Bobby L. Falls, advising him of the charges which he must face during this trial.

It is a method, as it were, of bringing the defendant into court,

and it is to be considered by you only in that light.

Putting it another way, ladies and gentlemen of the jury, the defendant in this case stands in identically the same position as any other citizen in the community. The mere fact that he is indicted in no way reflects on his guilt in this particular case.

Now the indictment in this case reads, ladies and gentlemen, that on or about February 21st, 1962, within the District of Columbia Bobbie L. Falls, with malice aforethought, murdered Veronica Smith by means of striking her with his hands, knocking her against a fence, and thereby causing injury to the said Veronica Smith from which she died on or about February 21st, 1962.

Now the pertinent provisions of the District of Columbia Code relating to Second Degree Murder reads:

> "That whoever with malice aforethought kills another is guilty of murder in the second degree."

106 Second degree murder is the unlawful killing of the person of another with malice aforethought. Murder in the second degree may be committed with or without any purpose to kill, if it is accompanied by malice.

The essential elements which the government or the prosecution must prove beyond a reasonable doubt, in order for you to find the defendant guilty of second degree murder, are first, that the defendant inflicted a wound or wounds or injury from which the decedent died; and second, that the defendant acted with malice, as I shall define that term to you, when he wounded Veronica Smith, the decedent in this case.

If you find that the government has proved beyond a reasonable doubt that the defendant with malice did injure or wound the defendant Veronica Smith, and that said Veronica Smith died from this injury, then you may find the defendant Bobbie L. Falls guilty of second degree murder.

If you do not find that the essential elements proved as to second degree murder, then you would find the defendant not guilty as to second degree murder.

Now the defendant in this case, as I said, is charged with second degree murder. Now murder is the unlawful killing of one human being by another with malice aforethought. By statute in the District of Columbia, murder is divided into two degrees. Murder in the first

107 degree and murder in the second degree.

Now murder in the first degree is murder committed with malice, with a purpose and intent to kill, and with deliberation and premeditation. However, murder in the second degree, with which this defendant is charged, is a murder committed with malice aforethought but without deliberation and premeditation.

As I stated to you earlier, the unlawful killing must be accompanied by malice, before the defendant can be guilty of second degree murder.

Now the word "malice" in its ordinary sense or use would indicate a feeling of hatred or ill will towards another, or a feeling of hostility toward an individual. In the legal sense, however, malice has a broader significance. It is a state of mind, deliberately bent on mischief, a generally depraved, wicked and malicious spirit.

Malice, as the law knows it, may also be defined as a condition of mind which prompts a man to do a wrongful act wilfully, that is, on purpose, to the injury of another, or to intentionally do a wrong act toward another without justification or cause. Malice may be either expressed or implied.

Implied malice is such as may be inferred from the circumstances of the act itself, as for example where the killing is caused by the in-

108 tentional use of a fatal force, without circumstances serving to mitigate or justify the act. Or when an act which imports danger to another is done so recklessly or wantonly as to manifest depravity of mind and disregard of human life.

In determining whether a wrongful act is done intentionally and is done therefore with malice aforethought, you should again bear in mind that every man is presumed to intend the natural and the probable consequences of his act.

Now ladies and gentlemen of the jury, the defendant in this case, Bobbie L. Falls, is charged, as you know, with second degree murder. But within it, or a lesser offense included, in this particular act is what is called "Manslaughter," and therefore the Court has the duty under the evidence that has been presented in this case, to instruct you on the law that applies to manslaughter. He is not indicted under manslaughter. He is indicted under second degree murder. But it also includes manslaughter because manslaughter is a lesser offense.

Now as I have said, under the offense of murder in the second degree there is included a lesser offense known as manslaughter.

Manslaughter is the unlawful killing of a human being without malice. For example, such killing as happens either on a sudden whirl

109 or in the commission of an unlawful act, without any deliberate intention of doing any mischief at all. Using the word "mischief" as injury, wounding any one.

Now if the killing is in a sudden heat of passion, caused by adequate and sufficient provocation, the crime is manslaughter. In order to reduce murder to manslaughter, however, the passion must be of such a degree as would cause an ordinary man to act on impulse, without reflection.

In addition to great provocation there must be passion and hot blood caused by that provocation.

Adequate provocation is that degree of provocation which would cause an ordinary man, that is a reasonable man or an average man, to become so aroused that he would act on impulse and without reflection. It is for the jury alone to determine whether under the circumstances of this particular case the defendant, Bobbie L. Falls, acted in a sudden heat of passion, caused by adequate and sufficient provocation, and without malice as that term has been defined to you, that is, that term "malice".

Also, ladies and gentlemen of the jury, in determining this case you naturally will take into consideration the method or the way that

Veronica Smith met her death. In other words, in this particular case the indictment specifically recites that it was caused by the striking of this defendant with his hands, as differentiated from a knife or a gun
110 or something of that sort. Obviously you will take into consideration the method of the alleged offense.

Also, as stated to you earlier, the first element of offense which the defendant is charged, is that the defendant inflicted a wound or injury from which the decedent Veronica Smith died.

The burden is on the government in this case to prove beyond a reasonable doubt that the wound or injury inflicted by the defendant was the cause of death of the decedent. If you do not so find beyond a reasonable doubt, then your verdict must be not guilty. You must determine from the evidence whether or not the injury by the defendant was the cause of death of Veronica Smith.

In this connection, you have heard the testimony of the doctor, the Deputy Coroner, who testified as to the cause of death; and you have heard the evidence of all of the parties as to exactly what occurred not only in the corner of 14th and T. Streets, but going east on T. so far as the fence was concerned, which was an iron picket fence.

There is a conflict in the testimony as to that point and it is for you to resolve that conflict. The Court will not comment on it because it has been presented to you by competent and experienced counsel, and you as jurors certainly have listened with attention to the evidence which
111 has been presented.

The Court has the right to comment on the evidence, but this Court feels that this particular jury understand the evidence which has been presented.

Now as I have stated, the indictment in the case is not to be considered by you as evidence. The indictment is only an allegation or a method or means of bringing this defendant into court, and all material parts or all material elements of the indictment must be proven by the government beyond a reasonable doubt.

Now then, what is meant by a reasonable doubt? A reasonable doubt is such a doubt as will leave the juror's mind after a candid and impartial consideration of all of the evidence so undecided that he or she is unable to say that they have an abiding conviction of the defendant's guilt, or such a doubt as in the graver and more important transactions of life would cause a reasonable and prudent person to hesitate and pause.

If after fairly and impartially considering all of the facts in this case you can truthfully say to yourself that you are not satisfied of the guilt of the defendant, then you have a reasonable doubt and you should acquit the defendant. But if after fairly and impartially considering all of the facts in the case you have an abiding conviction of the defendant's

112 guilt, then you can have no reasonable doubt and you should find the defendant guilty as charged, or guilty of manslaughter.

Now a reasonable doubt must have a foundation in reason and not in speculation or surmise. It must not be generated by a kindly feeling toward the defendant, or arise from any sympathy whatsoever. It must be a substantial doubt, arising from an insufficiency of all the evidence, and not be a mere possibility.

A reasonable doubt obviously is not a doubt to a mathematical certainty. A reasonable doubt is to a moral certainty.

Also, ladies and gentlemen, you are instructed that you are the sole judges of all the questions of fact. It is for you to say what weight you will give to the testimony of any witness who may have testified during the progress of the trial, and in passing upon the question as to the credibility of the different witnesses you should weigh carefully every fact and circumstance in connection with the testimony which has been submitted to you for your consideration.

You are instructed that a witness is presumed to speak the truth, and this presumption however may be overcome by contradiction or by contrary evidence, by the manner in which the witness testifies, or by

113 the character of the testimony, or by evidence pertaining to particular witness's motives.

Now some of the usual tests which among others it will be proper for you to apply are the deportment and the manner of the witness on the stand, his or her reluctance to answer, and apparent bias or interest in the result of the trial, the probability or the improbability of the testimony as told, and its harmony or its disharmony with other facts in the case which you may have already found to be proven beyond a reasonable doubt.

Moreover, it is within the discretion of the jury to reject in whole or in part the testimony of any witness whom you believe to have knowingly or wilfully testified falsely as to any material or important factor or circumstances in the case, accordingly, that is any facts that they could not possibly have been mistaken about. All of this is in accordance with the way that you deem it in view of all of the facts and the circumstances.

Also, ladies and gentlemen of the jury, you are instructed that the defendant, Falls, is presumed to be innocent of this charge, and this presumption attends him throughout the progress of the trial until it is overcome by evidence proving his guilt to your satisfaction beyond a reasonable doubt.

114 Before the jury can convict the defendant the prosecution must establish beyond a reasonable doubt that the defendant is guilty as charged, or is guilty of manslaughter.

In this case, as in all criminal cases, the defendant is not required to prove himself innocent or to put on any evidence at all on the subject. This is consistent with our theory of the law that a man is presumed innocent until proven guilty, and the government must establish his guilt beyond a reasonable doubt, to your satisfaction.

As I have indicated to you, you should consider all of the evidence in the case, and if after considering all of the testimony you have a reasonable doubt as to the guilt of the defendant, then you should acquit him. On the other hand, after hearing and evaluating all of the testimony you have no reasonable doubt as to the guilt of the defendant, then you should return a verdict of guilty.

You should consider all of the evidence in the case, both from the standpoint of the prosecution and the defense, and you are entitled to draw your own reasonable inferences and deductions from the testimony.

Ladies and gentlemen of the jury, you will consider this case deliberately, carefully, dispassionately, objectively, without bias or prejudice for the prosecution or for the defense; without emotion and without sympathy, and in the light of the instructions and the evidence which
115 has been presented to you. Bearing in mind that you are the sole judges of the questions of fact and that you are obligated to follow the law in the case.

Now the possible verdicts in this case are, first, you may find the defendant guilty as charged, that is, guilty of second degree murder; or two, in the event that you find the defendant not guilty of second degree murder you may find the defendant guilty of manslaughter; or three, you may find the defendant not guilty.

Are there any particular instructions requested, gentlemen?

MR. MOORE: The government is satisfied.

MR. TINNEY: We are satisfied, Your Honor.

* * * * *

116 VERDICT OF THE JURY

(3:02 p.m.)

THE DEPUTY CLERK: Will the foreman please rise?

Mr. Foreman, has the jury agreed upon a verdict?

JURY FOREMAN: We have.

THE DEPUTY CLERK: What say you as to the defendant Bobbie L. Falls on Count One of the indictment?

JURY FOREMAN: We find the defendant guilty of manslaughter.

THE DEPUTY CLERK: Member of the jury, your foreman says you find the defendant Bobbie L. Falls guilty of manslaughter and this your verdict so say you one and all?

(Unanimous.)

THE COURT: Is there anything further?

MR. TINNEY: Nothing from the defendant.

* * * * *

[Filed May 23, 1962]

VERDICT

On this 23rd day of May, 1962, came again the parties aforesaid, in manner as aforesaid, and the same jury as aforesaid in this cause, the hearing of which was respited yesterday; whereupon, after hearing the instructions of the Court, the said jury retires to deliberate.

Upon returning into Court said jury upon their oath say that the defendant is guilty of manslaughter.

The defendant is referred and committed to the District of Columbia Jail.

By direction of

LEONARD P. WALSH
Presiding Judge
Criminal Court # 4

Present:

United States Attorney

Luke C. Moore
Asst. U. S. Attorney

* * * * * *

[Filed July 2, 1962]

JUDGMENT AND COMMITMENT

On this 29th day of June, 1962 came the attorney for the government and the defendant appeared in person and by counsel, William A. Tinney, Jr., Esq.

IT IS ADJUDGED that the defendant has been convicted upon his plea of not guilty and a verdict of guilty of the offense of MANSLAUGHTER and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

IT IS ADJUDGED that the defendant is guilty as charged and convicted.

IT IS ADJUDGED that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of Five (5) Years to Fifteen (15) Years.

IT IS ORDERED THAT the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

/s/ Joseph C. McGarraghy
United States District Judge.

[Filed July 5, 1962]

NOTICE OF APPEAL

Name and address of Appealant: Bobbie L. Falls
200 - 19th Street S.E.
Washington 3, D.C.

Name and address of Appeallant's Attorney: William A. Tinney
620 - 5th Street N.W.
Washington 1, D.C.

Offense; Second Degree Murder

Concise statement of Judgment or order giving data, and any sentence:
found guilty of Manslaughter, May 23, 1962.
Sentenced June 29, 1962, Five (5) to Fifteen (15) years.

Name of institution where now confined, if not on bail:
District of Columbia Jail
200 - 19th Street S.E.
Washington 3, D.C.

I, the above named Appeallant, hereby appeal to the United States Court of Appeals for the District of Columbia Circuit from the above stated Judgment.

/s/ Bobby Lewis Falls
Appellant

Date: 7/2/62

Attorney for Appealant

AFFIDAVIT IN SUPPORT OF APPLICATION TO PROCEED WITHOUT PREPAYMENT OF COST

I, Bobby Falls, being first duly sworn, depose and say that I am the Petitioner, in the above entitled case, that in support of my application to proceed with being required to prepay fees, costs or give security therefor, I state that because of my poverty, I am unable to pay the costs of said proceeding, or to give security therefor, that I believe I am entitled to redress, and that the nature of my defense, action, appeal is briefly stated as follows:

1. Insufficiency of counsel in that said counsel allow petitioner to be sentenced before a Judge who did not hear, or try petitioner's case. Therefore, said Judge stated he was not familiar with petitioner's case, thereby giving petitioner a cruel, and harsh sentence, which is contrary to the evidence.

2. Improper sentence by said Judge.

3. Insufficiency of evidence to sustain the conviction.

I further have truthfully set forth information relating to my ability to pay the costs of defending the case against me.

1. Are you presently employed? No

A. If yes, give name and address of employer.

B. If No, name and give data of last employment: Charles Smith Construction Co., 1616 Rhode Island Ave., N.W. Washington, D.C.

2. How much cash do you have? None

3. Do you own any bank account, stocks, bonds,automobile, real estate, or other valuable property? None.

a. If yes give details:

4. Do you have a wife, Parent, or other person, who may be able to assist you in paying the cost of defense in this case? No.

a. If yes, give details:

(Answers to #5 and #6 required only in Criminal Case.)

5. How much case did you have at the time of your arrest? 1.00.

6. Are you not free on bond? No. If not, do you intend to apply for bond? No.

I understand that a false statement or answer to any question in this affidavit, will submit me to penalties for perjury.

/s/ Bobby Lewis Falls.

Subscribed and sworn to before me this 2nd day of July, 1962.

/s/ Orange C. Dickey
Notary Public, D.C.

Harry M. Hull, Clerk

By _____
Deputy Clerk

Let the applicant proceed without prepayment of costs, and with appointed counsel.

_____
District Judge

BRIEF FOR APPELLANT

UNITED STATES COURT OF APPEALS
For the District of Columbia

No. 17,715

BOBBY L. FALLS,

Appellant

v.

UNITED STATES OF AMERICA,

Appellee

Appeal From the United States District Court
For the District of Columbia

L. Welch Pogue
Pogue & Neal
1001 Connecticut Avenue, N.W.
Washington 6, D. C.

Counsel for Appellant
By Appointment of this Court

April 22, 1963

STATEMENT OF QUESTIONS PRESENTED

1. Under an indictment of second degree murder, is it plain error for the trial court to fail in its instructions to the jury to explain or define the "unlawful act" (or any of its constituent elements) which was stated in the instructions as a basis or test of the crime of manslaughter (and which is an essential element of that crime) where, under the evidence in the case, an assault would constitute the only possible "unlawful act" and where such an assault may or may not have been committed?

2. May an accused be convicted of the crime of manslaughter under instructions that were equivocal, confusing, misleading, and conflicting?

TITLE PAGE

BOBBY L. FALLS,

Appellant

v.

UNITED STATES OF AMERICA,

Appellee

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* Cases or authorities chiefly relied upon are marked by asterisks.

UNITED STATES COURT OF APPEALS
For the District of Columbia Circuit

No. 17,715

BOBBY L. FALLS,

Appellant

v.

UNITED STATES OF AMERICA,

Appellee

Appeal From the United States District Court
For the District of Columbia

BRIEF FOR APPELLANT

JURISDICTIONAL STATEMENT

Appellee brought the original action in the United States District Court for the District of Columbia (Criminal Case 224-62) upon an indictment returned March 12, 1962, charging appellant with one count of second degree murder within the District of Columbia, on or about February 21, 1962 (J.A. 1). Upon appellant's plea of not guilty (J.A. 1), the case went to trial before Judge Walsh on May 22, 1962

(J.A. 6), and on May 23, 1962, the jury returned a verdict finding appellant guilty of the lesser included offense of manslaughter (J.A. 49-50). Appellant was sentenced to serve from five to fifteen years in the penitentiary on June 29, 1962 (J.A. 50-51).

Appellant filed a timely notice of appeal and petition for leave to prosecute an appeal in forma pauperis with supporting affidavit in the District Court on July 5, 1962 (J.A. 51-53). Judge McGarraghy denied this petition under the appropriate statute (28 U.S.C. §1915(a)) on July 12, 1962.

On September 17, 1962, appellant filed a motion for leave to file a petition to prosecute an appeal in forma pauperis with this Court. This Court granted appellant's unopposed motion on September 24, 1962, and appellant's petition for leave to prosecute an appeal in forma pauperis was filed. On March 8, 1963, this Court granted appellant's petition for leave to prosecute an appeal in forma pauperis.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1291.

STATEMENT OF THE CASE

Appellant, Bobby L. Falls, was arrested at approximately 5:00 a.m., on the morning of February 21, 1962, in connection with the death of Veronica Smith which occurred on February 21, 1962, within the District of Columbia.

After being processed at the 13th precinct house, he was taken to the District Building, Homicide Squad, where he was questioned and asked to make a statement. Shortly thereafter (8:15 a.m.) appellant made a statement that was later introduced as evidence against him at his trial (J.A. 2-5). He was further detained until he was arraigned at, or around 3:00 p.m., that afternoon. On March 12, 1962, the grand jury returned an indictment charging appellant with one count of second degree murder in causing the death of Veronica Smith. The case went to a jury trial before Judge Walsh in the United States District Court for the District of Columbia on May 22, 1962. Appellant was represented by counsel whom he retained, William A. Tinney, Esquire.

The evidence presented at the trial shows that the appellant was with the deceased, Veronica Smith, whom he had known for about two months (J.A. 27), on the evening of February 20, 1962, in the Spa (Spar) restaurant located on the corner of 14th and T Streets, N.W., Washington, D.C. (J.A. 30). She was his girl friend (J.A. 30). After parting company with Veronica, appellant left the Spa (J.A. 30-31). Later he went to 7th and T Streets, N.W., expecting to find Veronica. She was not there (J.A. 3). About 2:00 a.m., he returned to the Spa and found Veronica standing outside the Spa on the corner of 14th and T Streets apparently talking with two of the musicians who had been performing in the Spa (J.A. 28, 31) as these musicians were

preparing to leave in an automobile (J.A. 15). Appellant admitted that he came up to the deceased and "smacked" her in the face (J.A. 3, 28, 31. See J.A. 11, 15-16, 18, 34). She ran out into the street and he called to her; she replied "If you want me, come and get me." (J.A. 28, 32. See J.A. 3, 11, 16, 19); and she laughed (J.A. 3, 28, 32). She turned and ran and appellant ran after her eastward on T Street; both of them coming onto the sidewalk along T Street in the race (J.A. 3, 11, 12, 16, 19, 28, 32, 34).

Along the sidewalk upon which appellant and deceased raced there was an iron picket fence (the stakes were flat on top) a little more than three feet high in which there was an open gate some distance from the corner (J.A. 12, 16-17, 19, 28, 32-33; Government's Exhibits 1 and 1A (Photographs of the location and the fence, admitted into evidence, J.A. 7, 25)). The evidence indicates that at about the open gate, appellant caught up with Veronica (J.A. 12, 16, 28, 33). The evidence varies as to whether Veronica fell (J.A. 28); or whether appellant ran into her when she stopped in an attempt to avoid him (J.A. 33-34), or pushed her (J.A. 3), or struck her, either before or after she fell (J.A. 12, 16-17). In any event, immediately thereafter, she was leaning, or lying, over the fence, or on the ground, near the open gate in the fence (J.A. 3, 12-13, 17, 19, 28, 33, 34).

Within a few hours of this incident deceased was taken to her home where she died at 4:30 a.m. on that same morning, February 21, 1962 (J.A. 2).

The deputy coroner testified on the basis of the autopsy that the cause of death was hemorrhage and shock due to a rupture of the liver and that deceased's body had abrasions about both knees and a bruise upon her right side over the general area where the liver is located (J.A. 6-7).

The jury found appellant guilty of the lesser included offense of manslaughter and on June 29, 1962, petitioner was sentenced to serve from five to fifteen years in the penitentiary (the maximum imprisonment under D.C. Code Anno. § 22-2405 (1961 ed.)) by Judge McGarraghy who was substituting for Judge Walsh, who was absent due to illness.

This appeal followed.

STATUTES AND RULES INVOLVED

D.C. Code Anno. §22-2405 (1961 ed.)

> "Whoever commits manslaughter shall be punished by a fine not exceeding one thousand dollars, or by imprisonment not exceeding fifteen years, or by both such fine and imprisonment."

Federal Rules of Criminal Procedure, Rule 52(b), 18 U.S.C.A. (1961).

> "Plain Error. Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court."

STATEMENT OF POINTS

In its charge on the crime of manslaughter the trial court erred in:

(1) failing to instruct the jury upon the legal rules applicable to the "unlawful act" of criminal assault because, without such instructions, the jury could not apply the facts to the test of whether the killing occurred during the commission of an "unlawful act"; and in

(2) instructing the jury in an inconsistent, confusing, misleading, or equivocal manner on other elements of the crime of manslaughter;

when the jury necessarily considered one of such elements in order to find appellant guilty of manslaughter.

SUMMARY OF ARGUMENT

The trial court committed plain error in its instructions concerning manslaughter. After giving detailed and adequate instructions concerning second degree murder (upon which appellant was indicted), the trial court gave brief and inadequate instructions on manslaughter.

The pertinent part of the instructions reads as follows:

> "Manslaughter is the unlawful killing of a human being without malice. For example, such killing as happens either on a sudden whirl or in the commission of an unlawful act, without any deliberate intention of doing any mischief at all. Using the word 'mischief' as injury, wounding any one." (J.A. 45).

1. The trial court omitted to identify or to give any instructions, as required by the peculiar facts of this case, as to the meaning or content of the "unlawful act" mentioned in its instructions as a basis for a verdict of manslaughter. It did not mention or define or explain an assault which, on the facts of this case, would be the only legal basis for a finding of the commission of such

an "unlawful act". It left the jury completely in the dark as to the degree of severity of an assault necessary to constitute the "unlawful act" mentioned. It did not deal with the effect of consent upon the legal concept of an assault which consent, under the evidence, may have been impliedly given here.

In this case no gun, knife, or other weapon of any kind was used. There is no evidence that the deceased was severely beaten or mauled or savagely attacked. The only clear-cut assault occurred when the appellant slapped the deceased in the face, an act not associated with the death of the deceased. The evidence differs as to the nature of the one physical contact which occurred when the appellant caught up with the deceased in their race. There is undisputed evidence that when, before the race started, appellant asked deceased to come to him, she replied, "If you want me, come and get me" and laughed, whereupon he raced after her (J.A. 3, 28, 32). Under these circumstances it was critically necessary for the trial court to explain to the jury what it takes to constitute an "unlawful act", how severe the "unlawful act" must be to justify a conviction of manslaughter, and what the effect of consent to physical contact may have been (if the jury should find that consent had been given by deceased). The court did not do this. The jury was left completely in the dark as to the legal

content and meaning of this vitally essential element or test of manslaughter. As this Court has said - "It is almost, if not, as important to a defendant to have a jury instructed on the law applicable to his particular case by the judge, who knows the law, as to have a jury of his peers." (Williams v. United States, 76 App. D.C. 299, 301 131 F. 2d 21, 23 (1942)).

2. The trial court in its instructions used the term "sudden whirl" as a basis or test for a finding of manslaughter (which, as a catch phrase, would have been remembered, and may have been relied upon by some or all of the jurors). No explanation or definition thereof was given. The evidence showed physical activity that might have been regarded by the jury as a "sudden whirl". In the absence of any explanation by the court, the use of this loose catch phrase rendered the instructions equivocal, confusing, misleading, and conflicting.

One reasonable construction of this "either...or" phrase involving "sudden whirl" is that "sudden whirl" and "unlawful act" are more or less synonymous, in each case "without any deliberate intention of doing any mischief at all." Thus, the jury might be lead to believe, in the absence of any clarifying instructions, that an "unlawful act" may be almost any casual activity which becomes unlawful because death occurred somehow in connection with an act which can be loosely described as a "sudden whirl".

However, stated as an alternative to, i.e., in contrast to, "unlawful act", "sudden whirl" indicates, or might well lead the jury to believe, that appellant could be found guilty of manslaughter resulting from the commission of a lawful act. Several of the physical gyrations in this case, including phases of the racing after the deceased by the appellant, may well have been considered by the jury as "sudden whirls".

It is obvious that the legally meaningless catch phrase "sudden whirl" may have been relied upon by the jury in convicting the appellant of manslaughter. To the jury, it may have included an act, or merely an attitude, involving intention, or no such intention, to do any mischief. The amorphous nature of this test makes it impossible to know what act or attitude on the part of the appellant the jury may have thought adequate to meet this test. Therefore, the unexplained use of this phrase was grossly prejudicial to the appellant. Thus, the instructions were equivocal, confusing, misleading, and conflicting.

3. The errors in the trial court's instructions to the jury, as summarized above, constitute "plain error" requiring reversal of the judgment below even though appellant's counsel at the trial did not object to the instructions (Jones v. United States, 113 App. D.C. 352, 308 F. 2d 307 (1962); Williams v. United States, supra.

ARGUMENT

This case presents no new or novel question of law. It does present an unusual factual situation where the trial court had a corresponding duty, not necessarily required in the usual case involving violent or vicious assault, to explain to the jury, in layman's language, what rules or tests it would have to apply to the facts of this case in order to find that the appellant had committed an "unlawful act" upon which a verdict of manslaughter could be based; and it had the duty to avoid the use of any equivocal catch phrase which might be used as a test for a verdict of manslaughter.

I. ALTHOUGH THE INSTRUCTIONS MENTION AN "UNLAWFUL ACT" AS A TEST OF THE CRIME OF MANSLAUGHTER, THE TRIAL COURT ERRONEOUSLY FAILED TO EXPLAIN WHAT MIGHT CONSTITUTE AN "UNLAWFUL ACT", OR TO DELINEATE ANY OF THE CONSTITUENT ELEMENTS THEREOF, UNDER THE FACTS WHICH CONFRONTED THE JURY IN THIS CASE.

The commission of an "unlawful act", while not the only test of the crime of manslaughter, was an essential or critical element of that crime upon the facts confronting the jury in this case. Because the trial court failed to explain to the jury what might constitute an "unlawful act", or to delineate any of the constituent elements thereof, under the facts of this case the judgment below should be reversed.

It is clear that "the responsibility of instructing the jury upon the essential elements of a crime rests upon the court" (Barry v. United States, 109 App. D.C. 301, 287 F. 2d 340 (1961)); and that a failure to fulfill this responsibility is plain error (Barry v. United States, supra; Jones v. United States, 113 App. D.C. 352, 308 F. 2d 307 (1962); Williams v. United States, 76 App. D.C. 299, 131 F. 2d 21 (1942)).

In the Williams case this Court said

> "It is almost, if not, as important to a defendant to have a jury instructed on the law applicable to his particular case by the judge, who knows the law, as to have a jury of his peers. The latter is supposed to safeguard our institution of fair trial by insuring impartiality. But of what value is an open mind, if it does not know, with clear delineation, the issues upon which it is to pass judgment?" (76 App. D.C. at p. 301, 131 F. 2d at p. 23).

This Court in that case stated the rule to be that the Court will "insist that the judgment of a jury be informed." (76 App. D.C. at p. 300, 131 F. 2d at p. 22).

The instructions given upon manslaughter in the instant case use the phrase an "unlawful act" as a test of whether an unintentional homicide may constitute manslaughter:

> "Manslaughter is the unlawful killing of a human being without malice. For example, such killing as happens either on a sudden whirl or in the commission of an unlawful act, without any deliberate

intention of doing any mischief at all. Using the word 'mischief' as injury, wounding any one." 1/ (J.A. 45).

At common law, which is applicable in the District of Columbia, 2/ involuntary manslaughter is an unintentional homicide without malice occurring in the commission of an unlawful act or resulting from culpable negligence in the

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1/ The court also instructed the jury upon manslaughter as a killing which occurs in a "heat of passion". The trial court continued, without interruption, as follows:

> "Now if the killing is in a sudden heat of passion, caused by adequate and sufficient provocation, the crime is manslaughter. In order to reduce murder to manslaughter, however, the passion must be of such a degree as would cause an ordinary man to act on impulse, without reflection.
>
> In addition to great provocation there must be passion and hot blood caused by that provocation.
>
> Adequate provocation is that degree of provocation which would cause an ordinary man, that is a reasonable man or an average man, to become so aroused that he would act on impulse and without reflection. It is for the jury alone to determine whether under the circumstances of this particular case the defendant, Bobbie L. Falls, acted in a sudden heat of passion, caused by adequate and sufficient provocation, and without malice as that term has been defined to you, that is, that term 'malice'." (J.A. 45).

2/ Inasmuch as there is no definition of the crime of manslaughter in the District of Columbia statutes (D.C. Code Anno. § 22-2405 (1961 ed.) imposes a penalty for manslaughter without defining the crime), the common law is applicable (D.C. Code Anno. §49-301 (1961 ed.); Durham v. United States, 94 App. D.C. 228, 240, 214 F.2d 862, 874 (1954); Hill v. United States, 22 App. D.C. 395, 401-402 (1903)).

commission of a lawful act or omission to perform a legal duty.[1/]

There is no question raised concerning the culpable negligence of the appellant, or that he failed to perform some legal duty. In any event, the instructions clearly fail to explain to the jury the nature and degree of negligence that may constitute culpable negligence; or to define any legal duty that appellant failed to perform. Consequently, except for the "sudden whirl" phrase which will be discussed below in Part II of this Brief, if the jury based its verdict upon an unintentional homicide it had to conclude that appellant was committing an "unlawful act" (which was suggested by the instructions) and it had to reach that conclusion without any aid from the instructions as to its legal meaning.

1/ 1 Wharton, Criminal Law and Procedure, § 289 (12th ed. 1957); 40 C.J.S. Homicide, §§ 55-63; IV Blackstone, Commentaries on the Laws of England, pp. 191-193 (11th ed. 1791); see Jones v. United States, 113 App. D.C. 352, 308 F. 2d 307 (1962). In the District of Columbia and at common law manslaughter is "the unlawful killing of another without malice" (Hansborough v. United States, 113 App. D.C. 392, 394, 308 F. 2d 645, 647 (1962); United States v. Hamilton, 182 F.S. 548. 551 (D.C. Dist. 1960). 1 Wharton, supra; § 271; 40 C.J.S. Homicide §37; IV Blackstone, supra). It is divided into voluntary and involuntary manslaughter (e.g. 40 C.J.S. Homicide, § 37; State of Maryland v. Chapman, 101 F.S. 335 (D. Md. 1951)). Voluntary manslaughter being an intentional homicide which is reduced from murder to manslaughter because it is committed in "heat of passion" caused by adequate legal provocation (1 Wharton, supra, § 274; 40 C.J.S. Homicide § 40; IV Blackstone, supra. See Bishop v. United States, 71 App. D.C. 132, 107 F. 2d 297 (1939)).

Upon the facts which confronted the jury in this case, the constituent elements of the "unlawful act" test upon which the trial court should have given instructions were an assault and the relation thereto of intent and consent. The trial court's instructions do not even mention an assault, or refer to any of the constituent elements of an assault. If the jury had been instructed upon an assault and the constituent elements thereof, they may very well have acquitted appellant altogether.

The only clear-cut assault occurred when appellant slapped deceased in the face before the race began, an act not associated with the death of the deceased. As to what physical contact occurred when the appellant caught up with the deceased in their race, the evidence is in conflict. But, there is undisputed evidence that when, before the race started, appellant asked deceased to come to him, she replied "If you want me, come and get me" and laughed, whereupon he raced after her (J.A. 3, 28, 32). Under these circumstances, the jury could easily have concluded that appellant did not commit an assault if it had been instructed upon the nature of such an unlawful act and the factors of intent and consent that must come into consideration.

In explaining the "unlawful act" of assault to the jury the trial court should have defined assault. Assault, like manslaughter, is not defined in the District of

Columbia statutes;[1/] but this in no sense relieves the trial court from its responsibility to instruct the jury upon the essential constituent elements of "unlawful act". In fact, wherever there are matters of legal complexity for the jury to cope with, there is a correlative duty on the trial court to explain those matters to the jury with care. This duty was not discharged here.

Furthermore, there may be a criminal assault; or a merely tortious assault; assault which includes a physical contact; and assault which consists solely of a threat or menacing gesture calculated to frighten. The trial court should have explained these differences to the jury and instructed them as to which type or kind of assault would be sufficient to sustain a conviction of manslaughter.

The issue of consent presented by the evidence in this case raises a more fundamental question since there is no assault if the physical contact or threat is made with the consent of the person touched or threatened. Deceased's reply that appellant should "come and get me", which is introduced by the testimony of appellant (J.A. 3, 28, 32) and corroborated by other testimony (J.A. 11, 19), and her accompanying laughter (J.A. 3, 28, 32), certainly raise the issue of consent. The failure to instruct the jury upon this issue may have caused them to completely ignore this crucial element.

1/ D.C. Code Anno. §§ 22-501-- 22-505 (1961 ed.).

In the Barry case, supra, the facts presented a similarly unclear issue concerning the knowledge that certain securities were forged. There this Court said that:

> "The evidence of knowledge that the check was falsely made and forged was not strong. It was almost entirely circumstantial and not easily pieced together. While sufficient to create an issue for the jury, we think its lack of clarity enhanced the importance of awareness by the jury that knowledge at the time of transportation must be established beyond a reasonable doubt. Failure to guide the jury in this respect may well have caused them to omit consideration of this branch of the case. We are not in a position to say, in other words, that the verdict indicates that the jury found the evidence bearing upon knowledge established this essential element of the crime. The judgment accordingly will be reversed and the case remanded for a new trial or other proceedings not inconsistent with this opinion." (109 App. D.C. at p. 303, 287 F. 2d at p. 342).

Another similar situation was presented to this Court in Williams v. United States, supra.

There, this Court, on its own notice, reversed a judgment of guilty on two counts of assault with a dangerous weapon and one count of rape, with recommendation of the death penalty, on the grounds, among other things, that "the crimes with their constituent elements were not defined, so the jury could not possibly apply this proper reasonable doubt instruction." (76 App. D.C. at p. 301, 131 F. 2d at p. 23).

It reasoned in more detail as follows:

"A basic defect of the charge is the failure to discuss and define the offenses included within the indictment. ...

Under the circumstances of this case, if the jury had known that several crimes with their several factors must come in for consideration and had known the meaning of the factors, such as assault, intent, lack of consent, resistance to the full under the circumstances, physical force, fear, the necessity of some penetration, it might have concluded that this defendant was not guilty of rape or even of any offense, or if he were guilty of rape, his guilt was not such as would require the extreme penalty. We have always been proud that under our law the elements which go to make up a crime are definitely established. To insist that a jury be told what rape is, and, when circumstances require, what the included offenses are, in the eyes of the law, is not to demand meaningless ritual. The average man has some idea of what murder is, but we would not expect a judge to say, Jurors, you know what murder is, go and decide if this man is guilty of it. To say that the jury, under proper instruction, might not have found defendant guilty or might not have inflicted the death penalty is not to interfere with its judgment. We merely insist that the judgment of a jury be informed and be made under the safeguards of correct procedure." (76 App. D.C. at p. 300, 131 F. 2d at p. 22).

In Jones v. United States, supra, this Court recently held that it was plain error to fail to instruct the jury concerning a legal duty of care under an indictment charging involuntary manslaughter.

Either a "legal duty", culpable negligence, or an "unlawful act" must be found to exist in order to sustain a conviction of involuntary manslaughter. By analogy to the Jones case, which involved a "legal duty", it was plain error in this case to fail to instruct the jury upon an "unlawful act" and to make it clear that appellant could be convicted of involuntary manslaughter only if the jury found beyond a reasonable doubt that appellant had committed an "unlawful act."

In Jones v. United States, this Court reasoned that:

"There are at least four situations in which the failure to act may constitute breach of a legal duty. One can be held criminally liable: first, where a statute imposes a duty to care for another; second, where one stands in a certain status relationship to another; third, where one has assumed a contractual duty to care for another; and fourth, where one has voluntarily assumed the care of another and so secluded the helpless person as to prevent others from rendering aid.

It is the contention of the Government that either the third or the fourth ground is applicable here. However, it is obvious that in any of the four situations, there are critical issues of fact which must be passed on by the jury -- specifically in this case, whether appellant had entered into a contract with the mother for the care of Anthony Lee or, alternatively, whether she assumed the care of the child and secluded him from the care of his mother, his natural protector. On both of these issues, the evidence is in direct conflict, appellant insisting that the mother was actually living with appellant and Anthony Lee, and hence should have been taking care of the child herself, while Shirley Green testified she was living with her parents and was paying appellant to care for both children.

In spite of this conflict, the instructions given in the case failed even to suggest the necessity for finding a legal duty of care. The only reference to duty in the instructions was the reading of the indictment which charged, inter alia, that the defendants 'failed to perform their legal duty.' A finding of legal duty is the critical element of the crime charged and failure to instruct the jury concerning it was plain error. 13/

13/ Williams v. United States, 76 U.S. App. D.C. 299, 131 F. 2d 21; F.R. Cr.P., Rule 52(b). The Government did request an instruction on 'omissions' as negligence. This was denied. The charge as given was nothing more than the stock manslaughter charge unrelated to the facts and issues in this case." (113 App. D.C. at pp. 355-356, 308 F. 2d at pp. 310-311. Footnotes 8-12 inclusive omitted.)

The jury may obviously have relied upon a finding that appellant lacked any intention of causing serious harm to the deceased, but under some conception of what might constitute an "unlawful act" they returned a verdict of guilty of manslaughter.[1/] Any such determination was necessarily uninformed because the trial court erroneously failed to fulfill its special responsibility to explain the essential element of the "unlawful act" of assault and its constituent elements as presented by the evidence in this case. This error was grossly prejudicial to appellant because the jury may have acted upon an entirely erroneous concept of what constitutes an "unlawful act."

II. THE TRIAL COURT'S USE OF THE PHRASE "SUDDEN WHIRL" IS SO EQUIVOCAL, CONFUSING, AND MISLEADING, AND SO IN CONFLICT, UNDER VARIOUS CONSTRUCTIONS, WITH OTHER INSTRUCTIONS GIVEN, AS TO CONSTITUTE PLAIN ERROR.

The phrase "sudden whirl" is equivocal and, under various constructions, in conflict with other instructions which were given. Because of the use of this completely

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1/ The verdict returned by the jury was guilty of manslaughter (J.A. 50). No distinction was made as to voluntary or involuntary manslaughter.

nonlegal and amorphous test of manslaughter as set forth in the instructions, the judgment below should be reversed.

It is well settled that "A conviction ought not to rest on an equivocal direction to the jury on a basic issue" (Bollenbach v. United States, 326 U.S. 607, 613 (1946)). If the instructions are in conflict and the erroneous one is prejudicial, reversible error has been committed because the jury may have relied upon the erroneous instructions (McFarland v. United States, 85 App. D.C. 19, 20, 174 F. 2d 538, 539 (1949)). In dealing with a trial court's inconsistent instructions, this Court stated the rule to be -- "We cannot speculate that the correct statements obliterated in the minds of the jurors the repeated erroneous statements." (Blocker v. United States, 110 App. D.C. 41, 44, 288 F. 2d 853, 856 (1961)).

The instructions here upon manslaughter use the phrase "sudden whirl" as a definition of the type of an unlawful killing that may constitute manslaughter.

The trial court did not define or explain "sudden whirl"[1]; and the jury, therefore, had only the layman's understanding of this vague, amorphous phrase to apply to the facts in its consideration of the case.

The Oxford Universal Dictionary defines "whirl" to mean

> "To move in a circle or similar curve; to circle, circulate; more vaguely, to move about in various directions, esp[ecially] with rapidity or force; to be in commotion" (p. 2417 (3rd ed. revised 1955)).

Thus, where as here, there was much moving about by the appellant and the deceased, followed by a race where the former chased the deceased, it is obvious that the jurors had, under this phrase, no firm legal test of the crime of manslaughter but the most vague and easy type of test that almost any sudden movement might satisfy. Furthermore, the trial court did not even make it clear whether the phrase is to be equated with "unlawful act" or is to be used in contrast thereto.

1/ The appellee raised a question as to whether the phrase "sudden whirl" is the product of a secretarial error (Opposition to Memorandum in Support of Petition for Leave to Prosecute an Appeal In Forma Pauperis, p. 2, filed in Falls v. United States, Misc. No. 1990 on February 25, 1963). Appellee suggests that the phrase actually used was "sudden whim". Appellant does not consider this correction to offer a significant difference. Appellant will refer to the instructions as they appear in the record, i.e., "sudden whirl".

The instructions regarding a killing which happens "in the commission of an unlawful act" were set forth in an "either...or" phrase with the term "sudden whirl". One reasonable construction is that a "sudden whirl" and "unlawful act" are more or less synonymous, in each case, "without any deliberate intention of doing any mischief at all." Thus, the jury might be lead to believe, in the absence of any clarifying instructions, that an "unlawful act" may be almost any casual activity which becomes unlawful because death occurred somehow in connection with an act which can be loosely described as a "sudden whirl".

On the other hand, stated as an alternative to, i.e., in contrast to, an "unlawful act", "sudden whirl" indicates, or might well lead the jury to believe, that appellant could be found guilty of manslaughter if he killed the deceased in the commission of a lawful act.[1/] Several of the physical gyrations in this case, including phases of the racing after the deceased by the appellant, or the ducking into the gateway in the fence by the deceased, may well have been considered by the jury as "sudden whirls".

1/ The jury was not instructed that petitioner could be found guilty of manslaughter resulting from the commission of a lawful act only if they found that petitioner acted with culpable negligence; rather, under these instructions the jury could hardly fail to believe that petitioner was guilty of manslaughter if he killed deceased in the commission of a lawful act in a manner that the jury may have interpreted to be a "sudden whirl".

There are a great many possible impressions that individual jurors may have received as to the possible meaning of this "sudden whirl" test as they listened to the instructions of the trial court. But it must remain pure speculation as to which of such widely variable meanings, if any, were considered as an easy basis upon which to rest a verdict of guilty. Not having any written instructions to review, a catch phrase such as "sudden whirl" would certainly make an impression and be remembered.

Under our system of law, a defendant is to be found guilty only where the jury reaches that conclusion beyond any reasonable doubt under clear and precise instructions upon the legal tests of the crime charged. This fundamental rule would be utterly ignored in this case if this nonlegal, loose, many-purpose phrase, "sudden whirl", unexplained in any way by the trial court, were allowed to remain as an available test which may have been applied in one of its various possible meanings by one or more, or for that matter, possibly by all, of the jurors.

It is obvious that the legally meaningless catch phrase "sudden whirl" may have been relied upon by the jury in convicting the appellant of manslaughter. To the jury, it may have included an act, or merely an attitude, involving intention, or no such intention, to do mischief. The amorphous nature of this test makes it impossible to speculate as to

what act or attitude on the part of the appellant the jury may have thought adequate to meet it.

Therefore, the unexplained use of this phrase was grossly prejudicial to the appellant. Thus, the instructions were equivocal, confusing, misleading, and conflicting, and, therefore, the judgment below must be reversed.

III. THE TRIAL COURT'S ERRONEOUS INSTRUCTIONS CONSTITUTE "PLAIN ERROR" WHICH REQUIRES REVERSAL OF THE JUDGMENT OF GUILTY EVEN THOUGH DEFENDANT'S TRIAL COUNSEL DID NOT OBJECT TO THE INSTRUCTIONS.

Appellant concedes that trial counsel did not raise objections to these instructions at the time that they were given by the trial court, but this omission does not bar the present consideration of these errors by this Court because these errors constitute plain error within the meaning of Rule 52(b) (Fed. R. Crim. Pro., 18 U.S.C.(1958 ed.)).

Rule 52(b) provides that: "Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court." This Court has applied Rule 52(b) to erroneous instructions such as those given in this case on the grounds that

> "... the responsibility of instructing the jury upon the essential elements of a crime rests upon the court. Failure to meet this special responsibility of the court itself

need not be overlooked by an appellate court because overlooked by counsel." Barry v. United States, supra, 109 App. D.C. at p. 302, 287 F. 2d at p. 341.

In the Barry case, this Court also stressed the importance of instructing the jury adequately upon the essential elements of the crime charged where the evidence is not strong or clear in the following language:

> "The evidence of knowledge that the check was falsely made and forged was not strong. It was almost entirely circumstantial and not easily pieced together. While sufficient to create an issue for the jury, we think its lack of clarity enhanced the importance of awareness by the jury that knowledge at the time of transportation must be established beyond a reasonable doubt. Failure to guide the jury in this respect may well have caused them to omit consideration of this branch of the case. We are not in a position to say, in other words, that the verdict indicates that the jury found the evidence bearing upon knowledge established this essential element of the crime. The judgment accordingly will be reversed and the case remanded for a new trial or other proceedings not inconsistent with this opinion." (109 App. D.C. at p. 303, 287 F. 2d at p. 342)

This Court has also made it clear that it is plain error affecting substantial rights for the trial judge in a manslaughter case to fail to explain the meaning of "legal duty" to support another in terms which the jury

can understand, Jones v. United States, supra. In the Jones case, the defendant was found guilty of involuntary manslaughter. The question turned upon the adequacy of the instructions by the trial court. This Court said:

> "In spite of this conflict, the instructions given in the case failed even to suggest the necessity for finding a legal duty of care. The only reference to duty in the instructions was the reading of the indictment which charged, inter alia, that the defendants 'failed to perform their legal duty.' A finding of legal duty is the critical element of the crime charged and failure to instruct the jury concerning it was plain error. 13/

13/ Williams v. United States, 76 U.S. App. D.C. 299, 131 F. 2d 21; F.R.Cr.P., Rule 52(b). The Government did request an instruction on 'omissions' as negligence. This was denied. The charge as given was nothing more than the stock manslaughter charge unrelated to the facts and issues in this case." (113 App. D.C. at p. 356, 308 F. 2d at p. 311. Footnote 12 omitted.)

Moreover this Court's holding that it will reverse a criminal conviction on its own motion where the trial court's instructions are inadequate to inform the jury as to the essential elements of the crime is not a recent development, but rather a holding of long standing. More than 20 years ago this Court, in reversing a judgment in a criminal case, Williams v. United States, supra, said

> "A basic defect of the charge is the failure to discuss and define the offenses included within the indictment. Rape was not defined generally, much less broken down into its constituent elements; naturally, as a result, the elements were not discussed or defined. The jury was not told what assault with intent to rape is, nor how it is distinguished from rape. ..." (76 App. D.C. at p. 300, 131 F. 2d at p. 22)

Thus, if it was error, reversible upon this Court's own motion, where the offenses called "assault with intent to rape" and "rape" were not "broken down into [their]...constituent elements", it is clear that a similar failure to "break down" the legal test of "unlawful act" in the manslaughter instructions must also be reversible error even where, as here, no objection was made at the trial.[1/]

In view of the foregoing, the appellant submits that the erroneous instructions given in this case which failed to instruct the jury concerning an "unlawful act"; and which contained the nonlegal catch phrase "sudden whirl" as a test of manslaughter constitute plain error within the meaning of Rule 52(b) upon which this Court may reverse the judgment below although no objections were taken at the trial.

1/ See United States v. Massiah, 307 F. 2d 62, 71 (2nd Cir. 1962); United States v. Levy, 153 F. 2d 995, 998-999 (3rd Cir. 1946); and see also Screws v. United States, 325 U.S. 91 (1945).

IV. CONCLUSION

For the foregoing reasons the appellant requests that the judgment of the court below be reversed.

Respectfully submitted,

/s/ L. Welch Pogue

L. Welch Pogue

Pogue & Neal
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Washington 6, D.C.

Counsel for Appellant
By Appointment of this Court

April 22, 1963

AFFIDAVIT OF SERVICE

I personally served (as provided in Rule 5(b) of the Federal Rules of Civil Procedure) a copy of the foregoing Brief upon David C. Acheson, United States Attorney, counsel for appellee, whose offices are in Room No. 3600, United States Courthouse, 3rd and Constitution Avenue, N. W., Washington, D. C., on this 22nd day of April, 1963.

In testimony whereof, I have set my hand and seal this 22nd day of April, 1963.

/s/ James E. Merritt (SEAL)

James E. Merritt
Pogue & Neal

Sworn to and signed before me this 22nd day of April, 1963.

/s/ Mary Marticelli (SEAL)
Notary Public

17,715

REPLY BRIEF FOR APPELLANT

UNITED STATES COURT OF APPEALS

For the District of Columbia

No. 17,715

BOBBY L. FALLS,

Appellant

v.

UNITED STATES OF AMERICA,

Appellee

Appeal From the United States District Court
For the District of Columbia

L. Welch Pogue
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Washington 6, D. C.

Counsel for Appellant
By Appointment of this Court

June 12, 1963

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CITATIONS

CASES:

MISCELLANEOUS

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* Cases or authorities chiefly relied upon are marked by asterisks.

UNITED STATES COURT OF APPEALS
For the District of Columbia Circuit

No. 17,715

BOBBY L. FALLS,

Appellant

v.

UNITED STATES OF AMERICA,

Appellee

Appeal From The United States District Court
For The District of Columbia

REPLY BRIEF FOR APPELLANT

I. THE CERTIFICATION BY THE COURT REPORTER CHANGING "SUDDEN WHIRL" TO "SUDDEN WHIM" DOES NOT REMOVE ANY OF APPELLANT'S OBJECTIONS TO THE TRIAL COURT'S INSTRUCTIONS.

Appellee contends that Appellant's objections to the use of the phrase "sudden whirl" in the trial court's instructions are now "out of the case" because of the Certification by the Court Reporter that the word "whirl" should be "whim". (Brief for Appellee, pp. 8, 9-10). On the contrary,

this certification (which was filed herein by the prosecution almost one year after the trial, Supplementary Record No. 2), does not in the least eliminate Appellant's objections as set forth in the Brief for Appellant.[1/]

To the jury, either phrase would, presumably, have the usual dictionary meaning. There is no claim by Appellee that the phrase "sudden whim [whirl]" is a proper legal test or basis upon which the jury could find the defendant guilty of

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1/ While Appellant did not object to the certification procedure seeking to change "whirl" to "whim", it is significant to note that this action demonstrates that the prosecution now recognizes the seriousness of the matter. It is plain error affecting the substantial rights of Appellant for the trial court's instructions to permit a verdict of guilty of manslaughter to be based upon a catch-phrase without any legal significance or meaning. The verdict of manslaughter here could have been (and well may have been) so based.

Appellee had noted in a two-line footnote in its very brief paper entitled "Opposition to Memorandum in Support of Petition for Leave to Appeal", filed in Falls v. United States, Misc. No. 1990, Feb. 25, 1963, that Appellee had consulted with the court reporter who stated that "whirl" should read "whim". This shows some familiarity of the Appellee with this matter. However, nothing was done to correct the transcript when the Joint Appendix was printed. After Appellant's Brief herein was filed, Appellee apparently decided that it was important enough to require the unusual effort of seeking a change in the transcript through the court reporter certification route.

manslaughter; but that was the result permitted under the trial court's instructions. Appellee tries quickly to dismiss the new phrase by stating -

> "Unlike the phrase 'sudden whirl,' the words 'sudden whim,' particularly when read in the context of the subsequent elaboration of them in the charge - as a killing done on impulse, without reflection, in the heat of passion caused by adequate provocation - had meaning for the jury and were a correct statement of the law." (Brief for Appellee, p. 10).

The catch-phrase "sudden whim" does not connote heat of passion in its dictionary meaning[1/] or in the trial court's instructions. The former is set forth in footnote 1 and utterly negates the concept of "heat of passion" as a constituent element thereof. The instructions say "sudden whim [whirl]" or "unlawful act" (J.A. 45). If the phrase "without any deliberate intention of doing any mischief at all" is held to modify "sudden whim [whirl]" as well as "unlawful act" (J.A. 45), then, clearly, the subsequent "heat of passion" instruction (where intention is a constituent element) could not possibly apply. But even if intention is

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1/ According to Webster's New Collegiate Dictionary (1958), the word "whim" means "A sudden turn or start of the mind; a humor; caprice; fancy" (p. 974). The word "humor" means "A changing and uncertain state of mind; a caprice; whim; fancy" (p. 403). The word "caprice" means "An abrupt change in feeling, opinion, or action, proceeding from some whim or fancy; a fantastic notion. The mental disposition or state which produces or is subject to such changes; capriciousness" (p. 123). The word "fancy" (which is common to all of the foregoing) means "Inclination; liking formed by caprice rather than reason; as, to strike one's fancy. A caprice; whim; impression. Imagination, especially of a capricious sort" (p. 299).

attributed to this catch-phrase (as seems even more necessary with the substitution of the word "whim" because it implies a sudden "start of the mind" or a "humor" or a "fancy" - each a conscious condition), it is incredible that a skilled trial judge would fly in the face of the ordinary, popular, and dictionary meaning of this phrase and assume that the jury would think he was expanding upon it when he explained the test of "heat of passion, caused by adequate and sufficient provocation." The trial court did not explain "sudden whim [whirl]" in the instructions following the use of those words. They had, therefore, only their ordinary catch-phrase meaning to the jury - a loose nonlegal concept completely insupportable as a test for the crime of manslaughter.

Appellant repeats and applies to the phrase "sudden whim" all of the objections set forth in Part II of its Brief herein, pages 21-26 under the heading -

> "II. THE TRIAL COURT'S USE OF THE PHRASE 'SUDDEN WHIRL' IS SO EQUIVOCAL, CONFUSING, AND MISLEADING, AND SO IN CONFLICT, UNDER VARIOUS CONSTRUCTIONS, WITH OTHER INSTRUCTIONS GIVEN, AS TO CONSTITUTE PLAIN ERROR."

If such Part II of Appellant's Brief be read by substituting the word "whim" for the word "whirl", the points made will

be equally applicable and valid with respect to this catch-phrase as so revised.[1/]

The defect and fatal error simply will not go away merely because the Appellee assumes, for purposes of his argument, that the Certification had cured everything.

The sound principle is that where the instructions to the jury contain conflicting or inconsistent tests of the crime in question, one of which is seriously in error, such faulty instructions require a verdict of guilty to be set aside because, as this Court has said -

> "... the jury might have followed the erroneous instruction." (McFarland v. United States, 85 App. D.C. 19, 20, 174 F.2d 538, 539 (1949); and
>
> "We cannot speculate that the correct statements obliterated in the minds of the jurors the repeated erroneous statements." (Blocker v. United States, 110 App.D.C. 41, 44, 288 F.2d 853, 856 (1961)).

It cannot be said that the defendant has been found guilty beyond a reasonable doubt where the jury could have

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1/ Contrary to Appellee's suggestion that "'whim,' unlike 'whirl' could not possibly be an improper reference to appellant's 'physical gyrations' at the time of the infliction of the injury" (Brief for Appellee, p. 10), it would have been entirely reasonable for the jury to have concluded that the trial court did intend to include within "sudden whim" a possible abrupt and sudden changing and uncertain state of mind of the defendant based upon the "come to me" idea, the "if you want me, come and get me" response of his "girl friend", and her laughing (J.A. 3, 28, 32) at the same time, followed by the race - all in the light of her failure to show up at their appointed rendezvous, and her attentions being given to the departing musicians.

based their verdict (and may well have done so) upon a grossly erroneous instruction. We cannot speculate that the jury did not follow this erroneous instruction. This error of the trial court constitutes plain error affecting adversely the substantial rights of Appellant.

II. APPELLEE'S BRIEF MISSES THE THRUST OF APPELLANT'S ARGUMENT THAT THE "UNLAWFUL ACT" UPON WHICH MANSLAUGHTER MAY BE BASED MUST BE RELATED TO THE FACTS AND ISSUES OF THE CASE, AND THE BASIC ELEMENTS THEREOF IDENTIFIED, IN THE INSTRUCTIONS TO THE JURY.

Appellee's claim that the word "unlawful" is not of such a nature as to require judicial definition (Brief for Appellee, pp. 8, 10-11), completely misses the thrust of Appellant's argument. Appellee states that the question presented is:

> "[D]oes it constitute reversible error for the court not to have defined the meaning of the term 'unlawful' as that word was used in the manslaughter instructions?" (Brief for Appellee, p. (I)).

But, the thrust of Appellant's argument is much more vital than that. It is not concerned with the dictionary definition of the adjective "unlawful"; but rather with the much more complex legal concept of what could constitute, under the facts of this case, an "unlawful act" as a test for manslaughter. Appellee's arguments relative to "unlawful" or "unlawfully" or similar adjectives or adverbs do not answer the need to have described or explained the acts and elements which are included in the phrase "unlawful act".

"Unlawful" is commonly defined circuitously as "Not lawful; illegal."[1/] Obviously, this definition would not assist a jury in determining whether a particular series of acts, and the manner in which they were performed, could constitute an "unlawful act". In such a determination under the facts of this case, it is necessary to understand what is an assault, and the relationship thereto of such elements as intent, purposefulness, and consent. The jury in this case had no help on these matters insofar as the instructions of the trial court are concerned. The duty to give such help is the essence of

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1/ Webster's New Collegiate Dictionary (1958), p. 931.

one of the trial court's chief functions in its relationship to the jury.[1/]

Appellee asserts, in effect, that it was unnecessary for the jury to know the relationship of "consent" to an "assault" because "It is nonsense to suggest that Veronica consented to being chased, pushed, and impaled onto the iron fence pickets merely because she said as she fled from Falls after he had hit her in the face with his fist, 'if you want me, you will have to come and get me'." (Brief for Appellee, pp.11-12). This is a conclusion for the jury to accept or reject under clear and sufficient instructions.[2/]

1/ Appellee attempts to bolster his argument with the statement that the "Model Criminal Instruction" on manslaughter "does not include any elaboration of or definition of the term 'unlawful act'." (Brief for Appellee, p. 11). These "Model" provisions seem to be only the equivalent of a law review article by the Hon. William C. Mathes, U.S. District Judge for the Southern District of California. (The article is entitled "Jury Instructions and Forms for Federal Criminal Cases". 27 F.R.D. 39 (1961).) Furthermore, the instruction suggested by Judge Mathes does not seem to be applicable to the situation before this Court, nor does it purport to be applicable to any and all manslaughter cases. The Judge's suggested instruction elaborates solely upon voluntary manslaughter, or a killing in "heat of passion."

2/ This characterization contains several factual errors. In the first place, Veronica was not "impaled". As shown in Exhibit 1A (Supplementary Record No. 1) and as stated in Appellant's Brief (p. 4) the stakes were flat on top; and there is no evidence that her skin was punctured or broken by the fence (see J.A. 7). Secondly, it seems clear that Veronica did challenge Falls to the "chase"; and there is undisputed evidence that she laughed when she said that if he wanted her, to come and get her (J.A. 3, 28, 32). Finally, the reference to hitting her in the face "with his fist" is a conclusion of Appellee's based upon one witness' testimony (J.A. 11), whereas other testimony characterized this encounter (not associated with death) as "smacked her in the mouth" (J.A. 3, 28, 31), and another witness did not know whether it was with his fist or open hand (J.A. 15-16). It should be remembered that she was his "girl friend" and that Appellant had not had any previous trouble with deceased (J.A. 4).

Appellee claims that there was no need to have an explanation to the jury of what kind of an assault would have constituted an "unlawful act" basis for a verdict of manslaughter because "this was a case of physical brutality" (Brief for Appellee, p. 12). This is a sheer and outright conclusion of counsel. The evidence is conflicting as to whether or not Appellant pushed the deceased (J.A. 3) or ran into her (J.A. 28, 33-34) or struck her with his bare hand while running or later (J.A. 12, 16-17) - and the record does not show what detailed findings of fact about this matter the jury may have made.

Appellee also asserts that it is a novel theory to say that only some degrees or types of assault are sufficient to sustain a conviction of manslaughter (Brief for Appellee, p. 12). Directly to the contrary, and in support of Appellant's position, are the manslaughter cases based upon negligence where a verdict of guilty is not returnable unless there is more than ordinary negligence, i.e., such a high degree of negligence as to amount to culpable or criminal negligence. Ordinary negligence might justify civil, but not criminal penalties. Likewise, merely a tortious assault, such as running into or pushing a person while running where bodily injury would not ordinarily be expected, might justify a civil remedy but not a manslaughter penalty.

The trial court had the duty to instruct the jury on both the acts and elements which, in the light of the evidence in this case, might constitute an assault and on the nature of an assault which would qualify it to be the "unlawful act" upon which a verdict of manslaughter might be based. This it did not do.

For all the reasons set forth herein and in Appellant's prior Brief, the Appellant requests that the judgment of the court below be reversed.

Respectfully submitted,

/s/ L. Welch Pogue

L. Welch Pogue

Pogue & Neal
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Attorney for Appellant
By Appointment of this Court

June 12, 1963

AFFIDAVIT OF SERVICE

I personally served (as provided in Rule 5(b) of the Federal Rules of Civil Procedure) a copy of the foregoing Reply Brief upon David C. Acheson, United States Attorney, counsel for Appellee, whose offices are in Room 3600, United States Courthouse, Washington 1, D. C., on this 12th day of June, 1963.

In testimony whereof, I have set my hand and seal this 12th day of June, 1963.

/s/ James E. Merritt

_____ (SEAL)
James E. Merritt

Pogue & Neal
1001 Connecticut Avenue, N.W.
Washington 6, D. C.

Sworn to and signed before me this 12th day of June, 1963.

/s/ Mary F. Marticelli

_____ (SEAL)
Notary Public

BRIEF FOR APPELLEE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17715

BOBBIE L. FALLS, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

DAVID C. ACHESON,
United States Attorney,

FRANK Q. NEBEKER,
LUKE C. MOORE,
WILLIAM C. WEITZEL, Jr.,
Assistant United States Attorneys.

QUESTION PRESENTED

In the opinion of the appellee, the following question is presented:

In the absence of a request, does it constitute reversible error for the court not to have defined the meaning of the term "unlawful" as that word was used in the manslaughter instructions?

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TABLE OF CASES

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United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17715

BOBBIE L. FALLS, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

Bobbie L. Falls was indicted on March 12, 1962, for the second-degree murder of his girl friend Veronica Smith. A jury convicted him of manslaughter and by a judgment and commitment filed on July 2, 1962, he was sentenced to a term of imprisonment of from five to fifteen years.

Veronica Smith was eighteen years old on February 21, 1962 (Tr. 5). That night, she and a friend, Elizabeth Garnett, went to the Spar Restaurant at 14th and T Streets, NW. (J.A. 9). They danced (J.A. 9) and drank cokes (J.A. 10). After the restaurant closed at two o'clock (J.A. 9), they stood on the corner for a few minutes talking to several members of the band which had been playing at the restaurant (J.A. 10). Elizabeth Garnett testified that while they were standing there, Bobbie Falls, Veronica's boy friend (J.A. 30), "walked up to her (Veronica) and hit her" in the "face" with his "fist" (J.A. 11). "After he hit her he told her to come there and she said if he want me come and get me, and that is when

he chased her" down T Street (J.A. 11). There was an "iron picket fence" along the sidewalk (J.A. 12).[1] Falls caught Veronica after about a one-hundred-foot chase (J.A. 12) and "hit her" (J.A. 12) as she was "leaning over the fence" (J.A. 12). Falls then walked up the street away from Veronica as she lay across the fence repeating "[O]h Bobbie, help me." (J.A. 13, 14.) Elizabeth Garnett went down the street to Veronica, put her arm around Veronica's waist and helped her up the street (J.A. 13). "Well, I caught ahold of her and we started up the street and she was weak, and she told me she couldn't walk, and so I helped her up the street, and that is when we got—not exactly to the corner—she told me she was hurt" (J.A. 13). They went into a restaurant about two doors from the Spar Restaurant and "just as we got in the door she fell out" (J.A. 13). A boy named Archie helped Elizabeth put Veronica on a bench (J.A. 13). Bobbie Falls came into the restaurant and over to Veronica (J.A. 13). He "kept slapping her on the face, telling her to wake up" (J.A. 13). But she didn't wake up. (J.A. 14.) "[H]er eyes were rolled back in her head and he kept slapping her" (J.A. 14). Archie took Veronica outside to get a cab and she "kept falling, and he kept picking her up and she kept falling, and that is when this fellow named Jessie, that works in this bar, a special police drove up and I stopped him and asked him if he would take her home for me and he said yes, and Archie and another fellow put her in the car" (J.A.14). An hour later Elizabeth saw Veronica at Veronica's home (Tr. 36). She was lying across a bed and Archie was trying to revive her with artificial respiration (Tr. 36).

Pheles Pearson was a member of the band at the Spar (J.A. 17, 18). He testified that he, Veronica, another girl (presumably Elizabeth Garnett), and several members of the band were standing on the corner talking at about two o'clock after leaving the club when a fellow whom he could not identify "came up and struck her [Veronica] in the face" (J.A. 15). The fellow chased Veronica down the street (J.A. 16) and when he caught

[1] Pictures of the waist-high fence with iron pickets are part of the record on appeal.

her he struck her in the side with his right hand (J.A. 16). Veronica fell onto the iron fence when she was hit (J.A. 16, 17). Pearson heard a "moan" and heard Veronica "began to call his name and ask him not to leave her" (J.A. 17). Elizabeth Garnett helped Veronica up the street (Tr. 48). Elizabeth "had her by one arm holding her up" (Tr. 48). Veronica "looked as if she was in pain" (Tr. 50). She was holding her left side in the "mid-line section" (J.A. 17).

Quincy Mattison, another member of the band at the Spar (J.A. 18), testified that he, Pearson, Elizabeth Garnett and Veronica were talking when Falls walked up and "hit Veronica in the face" (J.A. 18, 19). "Veronica backed away and she went back up on the sidewalk and he called her and she said, if you want me you will have to come and get me, and he chased her down the street" (J.A. 19). Mattison looked away to put his band instrument in a car and when he looked at Veronica again she was "leaning over the fence holding herself" (J.A. 19). "It was a metal picket fence" (J.A. 19). She "seemed to be hurt" (J.A. 20) and she was "calling Bobbie" (J.A. 20). Falls "just walked away" (J.A. 20). Mattison saw Elizabeth Garnett help Veronica up the street (J.A. 20).

Archie Nelson saw Veronica while several people were "holding her up" out in front of the Jazzerama (J.A. 21), the club about two doors from the Spar Grille (Tr. 63). "[S]he had been hurt so I took her inside the Jazzerama" (J.A. 21). "After I took her inside I sat her down and up comes Bobbie from nowhere" (J.A. 21). He sat down and "kept slapping her on the face and I said, Bobbie, stop. And Bobbie said, Oh, this bitch will leave with me" (J.A. 21, 22). Archie Nelson and several other persons helped drive her home (Tr. 67). When she got out of the car at her home Veronica said to Archie Nelson: "I am blind" (Tr. 70–71). They carried her upstairs into her apartment and laid her on the bed (Tr. 70) and called the police (Tr. 70). Veronica said nothing further (Tr. 70).

Jessie Harrison was driving past the Jazzerama when he saw a crowd of people standing outside of the restaurant, including Veronica and two fellows who were holding her (J.A. 22). He drove Veronica home (Tr. 75–77).

Metropolitan Police Officer Lupini arrived at Veronica's home and found her "unconscious" (Tr. 79, 80). He called an ambulance. Veronica was pronounced dead at D.C. General Hospital at 5:30 a.m. on February 21, 1962 (Tr. 90).

Deputy Coroner Rayford testified that the "cause of death was from hemorrhage and shock due to a rupture of the liver with a massive hemorrhage in the parietal cavity" (J.A. 6, 7). He found "abrasions about both knees, and she had a contusion, which is more literally mentioned as a bruise, over the right side of her lower chest, at the juncture of the fifth and sixth ribs of the sternum" (J.A. 7) over the area of the liver (Tr. 12, 13). He said that in his opinion a blow to the rear of Veronica's body while she was lying across a picket fence would have been sufficient to cause the type of injury which killed Veronica (J.A. 8). In his opinion an ordinary fall would not have caused such an injury (J.A. 8).

Officer Jackson arrested Falls at 6:15 on the morning of the crime (Tr. 85). "[W]e asked him what happened with the girl and he said that he just pushed her and she hit her head against the car" (J.A. 23).

Falls signed a written confession (part of the record on appeal). It stated in pertinent part (J.A. 2–4):

> "It was about 11:15 p.m. last night (Tuesday, February 20th, 1962) that I left Veronica Smith in the Spar Restaurant (1900–14th Street, N.W.). I went to 7th & T Streets, N.W. to the Ideal Sea Food Grill where I had a cup of hot tea. Then I went to the Mile Long Sandwich Shop at 7th and Florida Avenue, N.W. and had a piece of pie. I was supposed to meet Veronica at 7th and T Streets, N.W., but she didn't show up. I met a boy that they call Gangster, I don't know his name. He and I walked back to 14th and T Streets, N.W. We walked straight out T Street.
>
> When we got to 14th and T Streets I seen Veronica standing there talking to some boys that were in a car. When Veronica seen me, she acted like she was shocked.

She backed away from me and I smacked her in the mouth.

She ran down the street towards 13th Street and back up on the sidewalk. I walked back up on the sidewalk. I told her to come to me and she said that I could come and get her if I wanted her. She started laughing and running away from me and I chased her.

I was running pretty fast and when I got behind her I pushed her and she fell up by the fence and her coat caught on the fence. She called me, Bobbie, and I told her to get up. She just stayed there and I went over and picked her up. I walked over to a car that was parked by the alley. She leaned against the car and she called me again. I then turned around and walked back to 14th Street, N.W. I went into the Jazzarama and when I came out of there I saw Veronica and Shirley walking up the street. Veronica had her arms around Shirley's (Elizabeth Garnett) neck and they were walking up (north) on 14th Street, N.W.

I walked out of the Jazzarama and when she looked up at me she fell. Me and a boy named Archie (Archie Nelson) went over and picked her up. We took her into the Jazzarama and put her in a booth. I asked Archie if he had some smelling salts and he said that he didn't have any with him. Then we got some napkins and dipped them in water and put them on her head. She sat beside me with her head on my shoulder and we started to get her up to take her home when she fell out of the booth to the floor. We picked her up and Shirley said that she was faking. We took her on outside and Archie and I held her up and tried to stop a cab, but none would stop. Then Jessie, a Special Police Officer came up. He works in the Spar and he put her in his car and he took her home. I started walking home and Archie went with Veronica. Shirley went up (north) 14th Street, NW.

• • • • •

Questions by Detective John C. Wilson:

Q. Were you drunk or sober at the time of this altercation?

A. I was sober.

Q. Was Veronica Smith drunk or sober at the time of this altercation?

A. She wasn't drunk, but she had been drinking.

Q. Who was present when you pushed Veronica down while alongside of 1901 14th St. NW.?

A. Just me, Veronica and Shirley.

Q. Why did you hit Veronica in the mouth?

A. Because she told me a lie and I could have been home asleep. She was supposed to meet me at 7th and T Sts. NW.

Q. Have you ever had any previous trouble with Veronica Smith?

A. No sir.

Q. What is your relationship with Veronica Smith?

A. She is my girl friend.

Falls testified at trial that he saw Veronica standing on the corner of 14th and T Streets about 2:00 and that he walked up to her (J.A. 28). She was his girl friend (J.A. 30), although he was married (J.A. 30). "I had a pair of black gloves on when I walked up and I smacked Veronica" (J.A. 28). He said to Veronica "I will fight you and your men" (J.A. 31). She ran down the street and when he called to her she said "if you want me. come and get me" (J.A. 28). He chased her (J.A. 28) and "caught her right in the back, right up under the right shoulder (J.A. 33). "[S]he was running down the street and I was running down the street and I ran right into her" (J.A. 33). "She was right in the gate and that is when I ran into her. She was trying to stop and get out of my way and I was running too fast to stop and she stopped me right there" (J.A. 33). She "fell between the gate" (J.A. 33). "I picked her up and we walked over to the car and I turned and I walked away. She called me again so I turned and looked back and I walked on up the street. (J.A. 29) He testified

he went into the Jazzerama and later saw Veronica there (J.A. 29). He sat down beside her and put some wet napkins to her face (J.A. 29). "[S]he was real limber and she was quite heavy" (J.A. 37). He "tapped" her on the face about three times to revive her (J.A. 36, 37). When he got up "she fell in between the seats." (J.A. 29.) He said he helped put her in Jessie Harrison's car and that was the last he saw of her (J.A. 29).

He testified that his confession to the police was complete and accurate (J.A. 27) and he explained that when he used the word "pushed" in the statement he "meant the same as running into her" (J.A. 34).

Archie Nelson testified in rebuttal that Falls had not put wet napkins to Veronica's face (J.A. 40) and had not assisted Veronica into Jessie Harrison's car (J.A. 40). He said Falls had called Veronica a bitch in the Jazzerama and as for Falls' so-called "patting," Archie Nelson said "I wouldn't call it patting. He was hitting awful hard and I said. stop slapping the girl" (J.A. 40).

STATUTE AND RULE INVOLVED

Title 22, District of Columbia Code, Section 2405 provides:

Punishment for Manslaughter

> Whoever commits manslaughter shall be punished by a fine not exceeding one thousand dollars, or by imprisonment not exceeding fifteen years, or by both such fine and imprisonment.

Rule 30

FEDERAL RULES OF CRIMINAL PROCEDURE

INSTRUCTIONS

> At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. At the same time copies of such requests shall be furnished to

adverse parties. The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury, but the court shall instruct the jury after the arguments are completed. No party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objections. Opportunity shall be given to make the objection out of the hearing of the jury.

SUMMARY OF ARGUMENT

Appellant told the trial court at the conclusion of the charge that he was satisfied with the charge and now on appeal he cannot point to any error in the manslaughter instructions which constitutes plain error affecting substantial rights.

Appellant's complaints about the court's use of phrase "sudden whirl" are now out of the case since the court reporter has filed a certification that the word "whirl" is an error in transcription and that the phrase actually used by the court was "sudden whim."

In the absence of a request, the court was not required to define the term "unlawful" as it was used in the charge. The word is a word in common usage which had meaning for the laymen on the jury. The issue in the case was an obvious one of the credibility of witnesses and appellant was not prejudiced by the failure of the court to elaborate upon the term.

THE MANSLAUGHTER INSTRUCTIONS WERE PROPER AND IN ANY EVENT DO NOT CONTAIN REVERSIBLE ERROR

After instructing the jury fully and accurately on second degree murder and the meaning of malice aforethought (instructions not challenged on this appeal), the court instructed the jury on the lesser offense of manslaughter. It stated (J.A. 45):

> Now as I have said, under the offense of murder in the second degree there is included a lesser offense known as manslaughter.
>
> Manslaughter is the unlawful killing of a human being without malice. For example, such killing as

> happens either on a sudden *whim* [whirl] or in the commission of an *unlawful act*, without any deliberate intention of doing any mischief at all. Using the word "'mischief" as injury, wounding any one.
>
> Now if the killing is in a sudden heat of passion, caused by adequate and sufficient provocation, the crime is manslaughter. In order to reduce murder to manslaughter, however, the passion must be of such a degree as would cause an ordinary man to act on impulse, without reflection.
>
> In addition to great provocation there must be passion and hot blood caused by that provocation.
>
> Adequate provocation is that degree of provocation which would cause an ordinary man, that is a reasonable man or an average man, to become so aroused that he would act on impulse and without reflection. It is for the jury alone to determine whether under the circumstances of this particular case the defendant, Bobbie L. Falls, acted in a sudden heat of passion, caused by adequate and sufficient provocation, and without malice as that term has been defined to you, that is, that term "malice."

Appellant's claims of error on this appeal relate solely to these manslaughter instructions. The claims are made despite the fact that appellant's trial counsel told the court at the conclusion of the charge that he was "satisfied" with the instructions (J.A. 49).

Because of his trial counsel's asserted acquiescence in the instructions, appellant has the heavy burden on this appeal of showing plain error affecting substantial rights. Rule 30, Federal Rules of Criminal Procedure; *Villaroman* v. *United States*, 87 U.S. App. D.C. 240, 184 F. 2d 261 (1950) (rev'd on other grounds). "In the absence of a request for a charge, reversal is justified only if the failure to instruct constitutes a basic and highly prejudicial error." *Willis* v. *United States*, 106 U.S. App. D.C. 211, 213, 271 F. 2d 477, 479 (1959). Appellant can point to no such error.

Appellant claims that the use of the word "whirl" in the charge (see "whirl" in brackets in quotation *supra*) constitutes a reversible error. However, after the joint appendix and ap-

pellant's brief were filed, the court reporter filed a certification (which is part of the record on appeal) stating that the word "whirl" is an error in transcription and that the word actually used by the court was "whim," not "whirl." The court's charge therefore should read as it appears *supra* and not as it appears in the joint appendix and the transcript.

Appellant's criticisms of the charge for its use of the word "whirl" are inapplicable to the charge when the word "whim" is substituted for "whirl." Unlike the phrase "sudden whirl," the words "sudden whim," particularly when read in the context of the subsequent elaboration of them in the charge—as a killing done on impulse, without reflection, in the heat of passion caused by adequate provocation—had meaning for the jury and were a correct statement of the law. See *Bishop* v. *United States*, 71 U.S. App. D.C. 132, 107 F. 2d 297 (1939). And, of course, "whim," unlike "whirl" could not possibly be an improper reference to appellant's "physical gyrations" at the time of the infliction of the injury. (Appellant's brief, p. 24).

In the absence of a request, the court was not required to elaborate upon its instructions by defining the word "unlawful." *Byas* v. *United States*, 86 U.S. App. D.C. 309, 182 F. 2d 94 (1950) (court not required to define term "arranging" as word was used in statute under which defendant was prosecuted); *Guon* v. *United States*, 285 F. 2d 140 (8th Cir. 1960) (court not required to define "aiding and abetting"); *United States* v. *Private Brands*, 250 F. 2d 554 (2nd Cir. 1957) (court not required to define term "wilfulness" as word was used in explaining the statute under which defendant was prosecuted).[2]

An omitted instruction for which no request is made cannot be considered reversible error unless it concerns a "crucial issue

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[2] *Jones* v. *United States*, 113 U.S. App. D.C. 352, 308 F. 2d 307 (1962) presented a totally different situation from this case. Mary Jones was prosecuted for manslaughter on the theory that she was responsible for the death of a small child in her custody because she had failed to care for the child. The case did not deal with a mere failure to define the concept, "legal duty of care," but more importantly with a failure "even to suggest the necessity for finding a legal duty of care." Moreover, the term "legal duty," unlike the term "unlawful" is 1) a term with a peculiar legal significance; 2) a term without a standard meaning; and 3) a term which the laymen on the jury could not intelligently understand without judicial assistance.

either of law or fact of a sort with which the jury cannot properly deal without a particularized instruction from the court." *Obery* v. *United States*, 95 U.S. App. D.C. 28, 29 217 F. 2d 860, 861 (1954), *cert. denied*, 349 U.S. 923. That is not this case. The word "unlawful" is a common word in the layman's vocabulary. At least as applied to the facts of this case, it did not involve problems of legal niceties or double meanings with which the jury could not cope without a particularized instruction. The insignificant value to the jury of an instruction on the meaning of "unlawful" is reflected by the definition of the term given in the Model Criminal Instructions in 27 F.R.D. 39, 92 (No. 7.08). The Model Instruction defines "unlawful" as follows:

> Unlawfully means contrary to law. Hence to do an act unlawfully means to do willfully something which is contrary to law.

This additional instruction would have been valueless to the jury. The Model Instruction on manslaughter (27 F.R.D. 39, 162—sec. 23.09) is substantially similar to that given in this case and does not include any elaboration of or definition of the term "unlawful act."

Appellant can make no showing of any particular necessity for an instruction defining the word "unlawful." He offers two reasons why the jury could not deal with the manslaughter issue without a more particularized instruction but neither is convincing.

Both reasons reflect that appellant's real quest is for instructions on possible theories of defense rather than on terminology and those are the type of instructions whose omission are clearly not plain error affecting substantial rights. *Clarke* v. *United States*, 112 U.S. App. D.C. 219, 301 F. 2d 543 (1962); *Hilliard* v. *United States*, 121 F. 2d 992, 1000 (4th Cir. 1941).

First, appellant says that if the word "unlawful" had been defined in terms of a common law assault, the jury might have found that any possible assault by Falls was vitiated by Veronica's consent thereto. It is nonsense to suggest that Veronica consented to being chased, pushed and impaled onto the iron fence pickets merely because she said as she fled from Falls after he had hit her in the face with his fist, "if you want

me, you will have to come and get me." The court was not required to *sua sponte* instruct on this newly thought-up "consent theory" of defense. See *Clarke* v. *United States*, 112 U.S. App. D.C. 219, 301 F. 2d 543 (1962). Appellant in his testimony never suggested that he considered himself blameless for what happened because Veronica consented to his actions.

Second, appellant says that the court should have defined "unlawful" in terms of an assault because he says there are degrees or types of assault and only some degrees or types are "sufficient to sustain a conviction of manslaughter." (brief, P. 17). Appellant cites no authority for this novel theory. Moreover, this case didn't involve one of appellant's lesser type of assaults—i.e. threats. This was a case of physical brutality.

Once the jury had determined that appellant had not acted with malice aforethought, the real question for the jury was a factual question of credibility. If the jury believed the Government's witnesses and appellant's written confession—that appellant hit Veronica in the face with his fist, chased her down the street and pushed her into the fence, impaling her on the pickets—appellant was guilty of manslaughter. On the other hand if the jury believed appellant's uncorroborated story,—that appellant had unavoidably run into Veronica and caused the injury—appellant was innocent.

The court accurately instructed the jury on the rules of law applicable to the case. The issue in the case was an obvious question of the credibility of witnesses. That the jury understood the issue submitted for its determination is clear. Appellant had a fair trial.

CONCLUSION

Wherefore, it is respectfully submitted that the judgment of the District Court be affirmed.

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